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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1179

NEWS PRINTING COMPANY, INC., PETITIONER,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO BRIEF FOR APPELLANT

APPENDIX

DOCKET ENTRIES

Aug. 3, 1942.		Petition and Order to show cause for an order requiring the production of documentary evidence by News Printing Co., a corp., pursuant to subpoena, filed.
Aug. 6,	"	Affidavit of service filed.
Sept. 2,	"	Hearing on Order to show cause for an order requiring production of documentary evidence by News Printing Co., a corporation, pursuant to subpoena. Decision reserved. Briefs to be filed (Meany).
	2	Return to Order to show cause and answer to petition filed.
Apr. 3, 1943.		Testimony filed.
" "	"	Opinion filed (Meany).
May 21	"	Notice of motion for an order directing a re-argument of the application made by petitioner to enforce a subpoena issued pursuant to the Fair Labor Standards Act of 1938 filed.
May 27		Notice of motion of opposition to motion of Petitioner filed.
June 14		Hearing on motion for an order directing a re-argument of the application made by petitioner to enforce a subpoena issued pursuant to the Fair Labor Standards Act of 1938.
	14	Hearing on notice of motion of opposition to motion of petitioner. Motion denied (Meany).
July 14		Order vacating order of Aug. 3, 1942, dismissing Petition of the administrator of Wage & Hour Division filed (Meany).
Aug. 2		Notice of appeal filed. (Copy sent to CCA & Cole & Morrill 8/4/43.)
Aug. 2, 1943.		Designation for Transcript of Record filed.
	18	Assignment of Errors filed.
	18	Petition for appeal filed.
	18	Order allowing appeal filed.
	18	Citation issued.
	19	Praecipe filed.
	21	Citation returned, served, and filed.
	23	Affidavit of service of copy of praecipe filed.

PETITION

To the United States District Court for the District of New Jersey:

L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938 (Public No. 718, 75th Congress; 52 Stat. 1060), hereinafter referred to as the Act, respectfully applies to this Honorable Court for an order directing News Printing Company, the Respondent herein, to appear before him or such representatives as he may designate and to produce documentary evidence and to give testimony, as required by a subpoena duces tecum issued to it, as set forth herein, and as reasons therefor shows the Court:

I

Petitioner, L. Metcalfe Walling (hereinafter referred to as the Administrator), is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator, or his designated representatives, are empowered by virtue of section 11 (a) of the Act to investigate, enter and inspect places and records (and make such transcriptions thereof) of employment, in any industry, as he may deem necessary or proper to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of section 9 of the Act, the provisions of sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended, U. S. C., Title 15, sections 49 and 50 (relating *the* the attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Administrator, and the Administrator has the power to issue and

cause to be served upon any person a subpoena requiring the production of books, documents, records and papers relating to any matter under investigation:

II

Jurisdiction to issue the order hereinafter prayed for is conferred upon this Court by virtue of section 9 of the Federal Trade Commission Act (made applicable by section 9 of the Act, as aforesaid) which empowers any of the District Courts of the United States within the jurisdiction of which an investigation is carried on, in case of refusal to obey a subpoena to any corporation or other person, to issue an order requiring such corporation or other person to produce the books, documents, records, and papers designated in the subpoena. The investigation, in the course of which the subpoena duces tecum was issued by the Administrator and served, as hereinafter set forth, is being conducted in the District of New Jersey, within the jurisdiction of this court.

III

At all times hereinafter referred to, Respondent was and is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office and place of business at 143 Ellison Street, Paterson, New Jersey, within the jurisdiction of this Court.

IV

Upon information and belief: Harry B. Haines, during all times herein mentioned, was and is an officer of Respondent, to wit: Its President.

V

Upon information and belief: Respondent is engaged in the business of publishing a newspaper and in connection with such publication is engaged in the production of goods for interstate commerce and is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

VI

Upon information and belief: Repeatedly from sometime in July 1941, Petitioner, having reasonable grounds for believing that respondent was violating sections 6, 7, 11 (c) and 15 (a) (1) (2) (5) of the Act, said Petitioner, acting through his duly authorized representative, sought to make an investigation of respondent's business pursuant to section 11 (a) of the Act. In connection with such investigation the Respondent refused to permit said representative to inspect its books and records on the ground that its business was not subject to the provisions of the Act and that its employees were not engaged in activities covered by the Act. As appears from the affidavit of Henry L. Karabel, annexed hereto as Exhibit "A", Respondent refused to permit a duly authorized representative of the Administrator of the Wage and Hour Division, United States Department of Labor, to examine records pertaining to hours worked by or compensation received by its employees. It appears further from said affidavit that a request was made by said Henry L. Karabel to inspect such records which request was made to Harry B. Haines, president of the company, and said Harry B. Haines stated to him that he would not produce records of any kind unless duly ordered to do so by the Court and that he had ar-

ranged for counsel to represent Respondent in any application which might be made by Petitioner to enforce said subpoena. It also appears from said affidavit that said Harry B. Haines gave to said representative a copy of a letter which he had received from Elisha Hanson, Esquire, an attorney at Washington, D. C., advising that in his opinion a publisher was not obligated to permit an inspection of his records, books, and documents by inspectors of the Wage and Hour Division, United States Department of Labor, and that at the time of furnishing said copy, said Harry B. Haines advised the representative referred to that he would be guided by this opinion until and unless he was directed to the contrary by proper order of the Court.

VII

A subpoena duces tecum was duly issued and signed by the said Administrator, requiring Respondent to appear before one of the officers of the Wage and Hour Division, United States Department of Labor, designated therein at Room 510, Essex Building, 31 Clinton Street, in the City of Newark, State of New Jersey, on the 27th day of May 1942, at 10:00 o'clock in the forenoon of that date, and to produce specific books, papers, documents and records. Said subpoena duces tecum was duly served upon Respondent by delivering a duplicate original copy thereof to Harry B. Haines, President of Respondent, at its place of business, 143 Ellison Street, Paterson, New Jersey, on May 20, 1942. A copy of said subpoena duces tecum, with the return thereof, is annexed hereto and marked Exhibit "B" and made a part hereof:

VIII

Upon information and belief: At all times herein stated the said Harry B. Haines, as an officer of Respondent, had and has custody and control of the books, papers, documents and records described in the said subpoena duces tecum;

IX

At 10:00 A. M., on the 27th day of May, 1942, Henry L. Karabel, an officer of the Wage and Hour Division, designated in said subpoena duces tecum, was present at the office of the Wage and Hour Division, Room 510, Essex Building, 31 Clinton Street, in the City of Newark, State of New Jersey, for the purpose of examining the books, papers, documents and records, production of which was required by the said subpoena, but Respondent failed and refused to appear at the said time and place before the said officer or to produce the said books, papers, documents and records, as is more fully set forth in the affidavit of said Henry L. Karabel, annexed hereto, marked Exhibit "A" and made a part hereof;

X

All of the books, records, papers, documents and memoranda required to be produced by said subpoena were at the time of the issuance of said subpoena, and are now, relevant, material and appropriate to determine whether Respondent has violated sections 6, 7, 11 (c), 15 (a) (2) and 15 (a) (5) of the Act and will aid in the enforcement of the provisions of the Act;

XI

The books, records, papers, documents, and memoranda required to be produced by said subpoena

were at the time of the issuance and service of said subpoena, and are now, in the possession, custody and control of Respondent;

XII

This application is brought on by order to show cause rather than by notice of motion for the reason that the investigation hereinabove referred to has been seriously impeded by Respondent's refusal to comply with said subpoena and because it is desirable that said investigation proceed as expeditiously as possible in order that violations of the Act, if found to exist, may be dealt with according to law without undue delay;

XIII

No previous application has been made for the relief requested herein.

WHEREFORE, Petitioner respectfully prays:

(a) That an order be issued forthwith directing Respondent, News Printing Company, to appear and show cause before this Court upon a certain day to be fixed in the said order, why an order should not issue requiring said Respondent to produce the books, records, papers, documents and memoranda required by said subpoena duces tecum, before the Petitioner or before one of his authorized representatives, at such time and place as this Court may order.

(b) That upon the return of said order to show cause as above set forth, an order issue requiring Respondent to produce the books, records, papers, documents and memoranda required by said subpoena duces tecum, before Petitioner or before one of his authorized representatives at such time and place as this Court may order.

(c) That Petitioner have such other and further relief as may be necessary or appropriate.

(Signatures and Affidavit Omitted.)

(Exhibit A omitted.)

EXHIBIT B

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR—WAGE AND HOUR DIVISION

Subpena Duces Tecum

To: NEWS PRINTING COMPANY, a corporation,
143 Ellison Street, Paterson, New Jersey.

At the instance of the Administrator, Wage and Hour Division, Department of Labor, you are hereby required to appear before Charles N. Joseph, Joseph D. Breitbart, William B. Morley, Roland G. Cheesman and Henry L. Karabel, or before one of them, officers of the Wage and Hour Division, Department of Labor, at Room 510, Essex Building, 31 Clinton Street, in the City of Newark, on the 27th day of May, 1942 at 10:00 o'clock A. M. of that day, to testify In the Matter of News Printing Company, involving an investigation pursuant to the provisions of Sections 9 and 11(a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said corporation of sections 6, 7, 11 (c), 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

1. Any and all books and records which record the wages paid to your employees employed at your place

f business in Paterson, N. J. during the period from anuary 1, 1941, to the date hereof.

2. Any and all books, documents, time cards, time heets, papers, memoranda, or other records made or ept by you which record or pertain to the hours orked by your said employees during the period from anuary 1, 1941, to the date hereof.

3. Any and all books, records, receipts, documents r memoranda pertaining to newspapers, books, eriodicals or goods of any character sold, shipped, elivered or transported, or offered for transportation y you from your place of business in Paterson, New Jersey, during the period from January 1, 1941, to he date hereof.

FAIL NOT AT YOUR PERIL.

In testimony whereof, the seal of the Department of Labor is affixed hereto, and the undersigned, the Administrator of the Wage and Hour Division of said Department of Labor, has hereunto set his hand at New York, New York, this 15th day of May, 1942.

[L. S.] (SD) L. METCALFE WALLING,
Administrator, Wage and Hour Division
United States Department of Labor.

Served the within subpoena duces tecum upon News Printing Company, a corporation, by delivering to and leaving with Harry B. Haines, President of said corporation, a copy thereof, at Paterson, in the District of New Jersey, on the 20th day of May 1942, and at the same time showing said person this original with the seal of the Department of Labor affixed hereto, and informing him of its contents.

HUBERT J. HARRINGTON,
U. S. Marshal,
by (s) LEO A. MAULT, *Deputy.*

ORDER TO SHOW CAUSE

Upon the petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, duly verified the 21st day of July 1942, and filed herein on the 3rd day of August 1942, and the exhibits annexed thereto, it is hereby

ORDERED that respondent, News Printing Company, show cause, if there be any, before one of the Judges of this Court, at a stated term thereof for motions, to be held in the United States Court House, the Federal Building, Newark, New Jersey, on the 10th day of August 1942, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order of this Court should not issue requiring said respondent to appear before L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division designated by him, at such time and place as this Court may determine, and there to produce the following books, papers, documents and records:

1. Any and all books and records which record the wages paid to your employees employed at your place of business in Paterson, N. J., during the period from January 1, 1941, to the date hereof.

2. Any and all books, documents, time cards, time sheets, papers, memoranda, or other records made or kept by you which record or pertain to the hours worked by your said employees during the period from January 1, 1941, to the date hereof.

3. Any and all books, records, receipts, documents or memoranda pertaining to newspapers, books, periodicals or goods of any character sold, shipped, delivered or transported, or offered for transportation by you from your place

of business in Paterson, New Jersey, during the period from January 1, 1941, to the date hereof.

And to give evidence as required by a subpoena duces tecum of the Administrator of the Wage and Hour Division which was duly served upon Respondent in connection with the investigation of the said News Printing Company, pursuant to sections 9 and 11 (a) of the Fair Labor Standards Act, 1938 (52 Stat. 1060); and it is

FURTHER ORDERED that service of a copy of this Order to Show Cause, together with copy of said petition of L. Metcalfe Walling, be made upon Respondent on or before the 5th day of August 1942, and that such service be deemed sufficient service.

Dated: August 3, 1942.

THOMAS F. MEANEY,
United States District Judge.

RETURN TO ORDER TO SHOW CAUSE AND ANSWER TO PETITION

The respondent, News Printing Company, in response to the order entered by the Honorable Court on the 3d day of August, 1942, upon the petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, now appears and makes its return to said order to show cause

why an order of this Court should not issue requiring said respondent to appear before L. Metcalf, Walling, Administrator of the Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division designated by him, at such time and place as this Court may determine, and there to produce the following books, papers, documents and records:

1. Any and all books and records which record the wages paid to your employees employed at your place of business in Paterson, N. J., during the period from January 1, 1941, to the date hereof.

2. Any and all books, documents, time cards, time sheets, papers, memoranda, or other records, made or kept by you which record or pertain to the hours worked by your said employees during the period from January 1, 1941, to the date hereof.

3. Any and all books, records, receipts, documents or memoranda pertaining to newspapers, books, periodicals or goods of any character sold, shipped, delivered or transported, or offered for transportation by you from your place of business in Paterson, New Jersey, during the period from January 1, 1941, to the date hereof.

and to give evidence as required by a subpoena duces tecum of the Administrator of the Wage and Hour Division which was duly served upon Respondent in connection with the investigation of the said News Printing Company, pursuant to Sections 9 and 11 (a) of the Fair Labor Standards Act, 1938 (52 Stat. 1060);

as follows:

1. This Court is without jurisdiction in the premises.

2. The Administrator is without jurisdiction over respondent's affairs.

3. The attempted application of the Act to the business of this respondent violates its rights as guaranteed by the First Amendment to the Constitution of the United States.

4. The attempted application of the provisions of Section 11 (a) and (c) of the Act to this respondent is without authority under the Act and violates respondent's rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

5. The attempted application of the provisions of Section 11 (a) and (c) of the Act to the respondent also violates respondent's rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

6. By reason of the provisions of Section 13 (a) (8) of the Act the attempted application of any of the provisions of this Act in respect of wages or hours of employees of this respondent violates its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

7. By reason of the provisions of Section 15 (a) (1), (2) and (5) and those of Section 16 (a) and (b) the order requested by the Administrator would, if granted, violate the rights of this respondent as guaranteed by the Fifth Amendment to the Constitution of the United States.

8. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to employees of this respondent engaged in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman because of the provisions of Section 13 (a) (1) of the Act exempting such employees from the provisions of Sections 6 and 7 of the Act.

9. The Administrator is without authority to apply the provisions of Sections 6 and 7 of the Act to this respondent because of the provisions of Section 13 (a) (2) of the Act.

Further responding, and in particular in answer to the petition of the Administrator, respondent

1. Admits on information and belief that petitioner, L. Metcalfe Walling, therein referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor; denies that Section 11 (a) of the Act empowers the Administrator or his designated representatives to investigate,

enter and inspect places and records (and make such transcriptions thereof) of employment, in any industry, as he may deem necessary or proper to determine whether any person has violated any provision of the Act; denies that by virtue of Section 9 of the Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914, as amended, U. S. C., Title 15, Sections 49 and 50 (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the jurisdiction, powers, and duties of the Administrator in the manner alleged by petitioner; and denies that the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the production of books, documents, records, and papers relating to any matter under investigation.

Further answering the allegations in paragraph I, respondent respectfully shows that under the precise provisions of Section 11 (a) of the Act no general authority is given to the Administrator or his designated representatives to enter for purposes of inspection any establishment unless that establishment be "in any industry subject to this Act"; that there has been no determination that the newspaper publishing business as such is an industry subject to the Act; that the newspaper publishing business is not an industry subject to this Act as is more fully shown in the affidavit of Kenneth E. Olson, Dean of the Medill School of Journalism, Northwestern University, marked "Exhibit A" attached hereto and asked to be read as a part hereof and in the affidavit of Carl W. Ackerman, Dean of the School of Journalism, Columbia University, marked "Exhibit B" attached hereto and asked to be read as a part hereof; that this respondent is not an industry subject to the Act, as is more fully shown in the affidavit of Harry B. Haines, marked

"Exhibit D" attached hereto and asked to be read as a part hereof; that the Administrator has assumed and asserted authority not even purported to be given to him by the Act to enter and inspect all places of business in the United States, including newspaper publishing plants, without any prior formal determination as to whether the Act applies to such and in the absence of complaint and without reference to any charge of violation of law, as is more fully set out in the affidavit of Elisha Hanson, marked "Exhibit C" attached hereto and asked to be read as a part hereof; that the purported subpoena duces tecum issued herein alleges that an investigation is being made of complaints of violation by respondent of certain sections of the Act whereas nowhere either in the petition of the Administrator or in the affidavit of Henry L. Karabel attached thereto is there any allegation that complaints of violation by respondent have been made in fact or upon information and belief.

2. Denies each and every allegation in paragraph II. Further answering the allegations of said paragraph II, respondent respectfully shows (a) that the investigation alleged to have been conducted was not conducted in accordance with the precise provisions of Section 11 (a) of the Act; (b) that the Administrator is without jurisdiction over respondent's business; and (c) that this Court is without jurisdiction.

3. Admits that respondent is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office and place of business at 143 Ellison Street, Paterson, New Jersey; denies that it is within the jurisdiction of this Court in this proceeding.

4. Admits that Harry B. Haines is the President of respondent corporation.

5. Admits that respondent is engaged in the business of publishing a newspaper; denies each and every other allegation in paragraph V.

Further answering the allegations of said paragraph V, respondent respectfully shows that it is engaged in the business of disseminating important public information in the printed form, said information being in the nature of news, editorial comment, and advertising matter which when gathered together by respondent is published by respondent in its newspaper, the "Paterson Evening News," which is published each weekday evening throughout the year; that the function of a daily newspaper is not to produce goods for commerce but to serve its community through the dissemination of information in the printed form as is more fully described in the affidavits of Kenneth E. Olson and Carl W. Ackerman, marked "Exhibits A" and "B" attached hereto and asked to be read as a part hereof; that but an infinitesimal amount—less than 1 percent—of its circulation of more than 23,000 copies daily is distributed outside of the State of New Jersey, which circulation is more fully described in the affidavit of Harry B. Haines, marked "Exhibit D" attached hereto and asked to be read as a part hereof.

6. Denies each and every allegation of paragraph VI. Further answering the allegations of said paragraph VI, respondent denies that the provisions of Sections 6, 7, 11 (c) and 15 (a) (1), (2) and (5) of the Act apply either to its employees or to respondent itself; denies that Henry L. Karabel had any authority under Section 11 (a) of the Act to enter its plant for the purpose of making an inspection.

Still further answering the allegations of said paragraph VI, respondent respectfully shows that on July 10, 1941, one Henry L. Karabel appeared at re-

spondent's office, represented himself to be a duly authorized representative of the Administrator, and sought to make an investigation of respondent's business; that respondent on advice of counsel refused to permit said purported representatives to inspect its books and records on the grounds that its business is not subject to the provisions of the Act and that its employees are not subject to the provisions of the Act and that its employees are not engaged in activities covered by the Act; that respondent therefore refused to permit said purported representative to examine records pertaining to hours worked by or compensation received by its employees; that respondent informed said purported representative that it would not produce for inspection records of any kind unless duly ordered to do so by the Courts.

Still further answering the allegations in paragraph VI, respondent respectfully submits on information and belief that the attempt to inspect its business was made by said Henry L. Karabel in the carrying out of a program laid down by the Administrator and his predecessors for an inspection of all business and industry in the United States in the absence of any complaint against any particular business or industrial establishment and without reference to any charge of violation of law and in the absence of any such charge of violation of law and without any prior determination as to the applicability of the provisions of the Act to such businesses and industries, as is more particularly described in the affidavit of Elisha Hanson, marked "Exhibit C" attached hereto and asked to be read as a part hereof.

Still further answering the allegations in paragraph VI respondent respectfully shows that whereas it is alleged that repeatedly from some time in July, 1941, petitioner sought to make an investigation of

respondent's business, the said paragraph itself merely refers to one attempt to examine the records of respondent and the affidavit of Henry L. Karabel, attached to the petition, likewise alleges only one visit to respondent's office on July 10, 1941.

7. Denies each and every allegation of paragraph VII. Further answering the allegations in said paragraph respondent respectfully shows that a person purporting to be Leo A. Mault appeared at its office on the twentieth day of May, 1942, and handed to Harry B. Haines, respondent's President, a duplicate original copy of a paper purporting to be a subpoena duces tecum signed by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor; that the paper marked "Exhibit B" and attached to the application is a true copy of the paper handed to Harry B. Haines on May 20, 1942, by said Mault.

Answering further, respondent objects to the description of the alleged subpoena contained in said paragraph VII and prays reference to the alleged subpoena itself; denies that the alleged subpoena purported to call for the production of specific books, papers, documents, or records.

8. Admits that Harry B. Haines had and has custody and control of respondent's books, papers, documents and records; denies that the description in said alleged subpoena duces tecum is a correct description of any of respondent's books, papers, documents and records.

9. Is without knowledge as to the whereabouts of Henry L. Karabel as alleged in paragraph IX at the time alleged; admits that it did not appear before him at the time and place alleged; denies that there was any legal requirement for it to appear then or at any other time in compliance with the command of the

alleged subpoena duces tecum; denies that the alleged subpoena duces tecum is a valid subpoena duces tecum.

10. Denies each and every allegation of paragraph X. Further answering the allegations of paragraph X respondent respectfully submits that the Administrator is without authority, under the Act, to conduct a general fishing expedition into respondent's business to determine whether respondent has violated Sections 6, 7, 11, (c) and 15 (a) (2) and (5) of the Act. Respondent further denies the applicability of said provisions of the Act to its business or to its employees, and respectfully submits that the administrator is without any jurisdiction whatsoever over its business.

11. Denies that the alleged subpoena duces tecum required this respondent to produce any books, records, papers, documents or memoranda whatsoever; admits that all the books, records, papers, documents and memoranda of respondent are in the possession, custody and control of respondent.

Finally, respondent denies the authority of this Court to issue any order requiring the production of books, papers, records or documents whatsoever in compliance with the alleged subpoena duces tecum herein.

Wherefore, respondent respectfully prays:

(1) That the order issued on the third day of August, 1942, requiring it to appear before this Honorable Court to show cause, etc., hereinbefore referred to be vacated, and

(2) That this proceeding be dismissed.

(Signatures omitted.)

Exhibit "D"

AFFIDAVIT OF HARRY B. HAINES

STATE OF NEW JERSEY,
County of Passaic, ss:

Harry B. Haines, being duly sworn, deposes and says:

I am a resident of Paterson in the County of Passaic and State of New Jersey. For a period of more than 30 years last past I have been continuously, and am now, President of the News Printing Company, a corporation which is organized under the laws of the State of New Jersey, which is located at Paterson, and which is engaged in printing and publishing in Paterson the daily newspaper called the "Paterson Evening News."

During said period I have been and am now thoroughly familiar with the News Printing Company's business, its operations in all departments, and the circulation and distribution of its said newspaper.

For the twelve months ending September 30, 1941, as audited by the Audit Bureau of Circulations, the entire total net paid circulation of the Paterson Evening News was 27,470.

Less than one per cent thereof, or a daily average total of 278 of said newspapers were distributed, during said twelve months' period, to states other than New Jersey; and a daily average total of 23,629 were distributed entirely within the County of Passaic in the State of New Jersey in the cities, towns and villages, all within the County of Passaic as follows:

Bloomingdale	154
Clifton	1,157
Haledon	587

Hawthorne	1,235
Little Falls—Singac	445
North Haledon	309
Passaic	49
Paterson	16,961
Pompton Lake	293
Prospect Park	632
Totowa Borough	255
Wanaque-Haskell-Midvale	140
Wayne-Mountain View-Preakness	536
West Milford-Newfoundland	59
West Paterson	812
Total	23,624
By mail in Passaic County	5
	23,629

The break-down of figures listed above is for the publication date of September 23, 1941, which was the date selected by the Audit Bureau of Circulations as being a typical average day and there would be but a slight variation of this figure over a year period.

Of the 278 copies distributed to points outside the State of New Jersey, 103 went to dealers for resale in the State of New York and one to a dealer for resale in another State. These dealers continuously have exercised the right, accorded to them by respondent, to return to the respondent newspapers which they did not sell. The remaining 174, out of said 278, were distributed by the respondent by mail as follows: 54 to addresses in the State of New York and 120 to addresses at all other points. From personal knowledge and from information and belief I say that the majority of the said 174 newspapers so mailed went to residents of Paterson in the armed or naval forces of the United States and that the remainder went to residents of Paterson who were young students at schools and colleges or who were temporarily employed outside of Paterson, or to former residents of Paterson.

(Signatures and date omitted.)

EXHIBIT E

AFFIDAVIT OF THOMAS DUNKLEY

STATE OF NEW JERSEY,
County of Passaic, ss:

Thomas Dunkley, being duly sworn, deposes and says:

I am the Manager of the Circulation Department of the Paterson Evening News.

I have read and am familiar with the affidavit of Harry B. Haines, to which this affidavit is annexed. The statements made in the said affidavit of Harry B. Haines with reference to the circulation of the several weekly newspapers published in the County of Passaic, State of New Jersey, are based upon information procured by me and given to Mr. Haines. I procured the information concerning the circulation of the said newspapers either by telephone or letter from the publishers or members of the circulation department of the several newspapers.

This affidavit is made for use in the above-entitled case.

(Sgd.) THOMAS DUNKLEY.

SUBSCRIBED AND SWORN TO before me this 27th day of August 1942.

(Sgd.) GEORGE J. GROSS,
A Notary Public of New Jersey.

OPINION

(Filed April 3, 1943)

The question to be determined in this case is whether this Court should issue an order enforcing the subpoena duces tecum heretofore issued by the Administrator of the Wage and Hour Division of the Fair Labor Standards Act of 1938 (29 U. S. C., sec.

201 et seq.) pursuant to section 9 of the said Act. (In this opinion said Administrator shall be referred to as the Administrator, and said Act as the Act.)

The Respondent herein is engaged in the business of publishing a newspaper in Paterson, New Jersey, within the jurisdiction of this Court, and refused permission to the agents of the Administrator to inspect its books and records, on the ground that its business was not subject to the provisions of the Act and that its employees were not affected by it.

The purpose of the requested inspection was to examine the records of the Respondent to determine the hours worked by and the compensation received by its employees and to seek for possible violations of sections 6, 7, 11 (c), 15 (a) (2) and 15 (a) (5) of the Act.

Upon the refusal of the Respondent to permit any inspection of its books or records, the Administrator issued a subpoena duces tecum, requiring the Respondent to appear before one of the officers of the Wage and Hour Division, United States Department of Labor, and to produce all books and records concerning hours and wages of its employees from January 1, 1941, to the date of the subpoena, May 15, 1942, and also all records pertaining to sale, shipment, delivery, or transportation by Respondent of newspapers, books, periodicals, or goods of any character between the same dates.

Upon advice of counsel, Respondent failed to observe the requirements of the subpoena, whereupon the Administrator filed a petition requesting the issuance by this Court of an order to show cause why an order should not issue directing Respondent to comply with the requirements of the said subpoena. The order to show cause was issued and argument had thereon.

In an examination of the situation before the Court the first matter that arises for settlement would seem to be whether in a proceeding such as the instant one, the Respondent may raise the question of its coverage by the Act.

In its return to the Order to Show Cause, Respondent, along with certain objections to the constitutionality of the Act in its attempted applications to a newspaper, in effect sets forth its claim that the Administrator is without jurisdiction over Respondent and that the Act does not apply to it.

The Administrator insists that the question of coverage may not be raised in opposition to the enforcement of the subpoena and insist that Congress by the enactment of the Act intended that the Administrator should have full power to administer its provisions and that all phases of its administration with the provisions of the Act were left to his judgment and not to the judgment of the Courts.

Relying on sections 9 and 11 (a) of the Act, the Administrator insists that the issuance of the subpoena is in no wise dependent on proof of coverage and that under the broad provisions of section 11 (a) he has power not only to investigate and gather data concerning pertinent matters in any industry subject to this Act, but that he may also issue administrative subpoenas and secure enforcement of them in this Court regardless of the question of coverage, since that issue is not a jurisdictional fact to be determined by the Court before such enforcement, but is initially for the Administrator to determine as a fact, binding on the Court.

Reliance is had in large part by the Administrator on the cases of *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 208, affirmed by the United States Supreme Court in an opinion recently handed down by Mr. Justice

Jackson, and upon *Holland* v. *Standard Dredging Corp.*, 44 F. Supp. 601.

Careful analysis of the opinion of Justice Jackson in the Endicott Johnson case indicates a distinction between that case and the one at bar. In the Endicott Johnson case, the corporation had voluntarily entered into contracts with the Government, and the matter which the Secretary of Labor was investigating was an alleged violation of the Act on the part of those who had become subject to the provisions of the Act by their own choice. The Walsh-Healy Public Contracts Act, 41 U. S. C., Sec. 35–45, provided a course of procedure during which the subpoena in question was issued. That Act provided that the Secretary was authorized to hold hearings "on complaint of a breach or violation of any representation or stipulation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath" and provided in case of refusal of any person to obey such an order that the District Court should have jurisdiction to order compliance with the direction of the Secretary.

No such procedure is outlined in the Fair Labor Standards Act.

In the Endicott Johnson Corporation case, the secretary in accordance with the provisions of the Walsh-Healey Public Contracts Act, instituted an administrative proceeding against the corporation, charging violation of the stipulations in the contract and in the course of the hearing, further provided for in the Act, issued the subpoena the effect of which later was challenged.

In the instant case, the Administrator without complaint and simply in quest of information upon which to base proceedings, should they be justified, issued his subpoena directing the production of certain records,

the examination of which might or might not disclose a violation. The suggestion has been made that to deny enforcement of a subpoena such as the one issued in the instant case would be to divide proceedings into two distinct stages—one concerning the presence of "Commerce," and the other to determine other elements of violation of the law.

There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto, and to the objection that this course of procedure would lead to unwarranted delay in the carrying out of the Act, it would seem reasonable to suggest that only in cases where doubt could exist, would such question as has been raised herein be the basis of objection, and should frivolous claims be made they could very easily be determined by the Court at the time of application for an order enforcing the terms of the subpoena.

The U. S. Supreme Court in the Endicott Johnson case, above referred to, granted certiorari because "of the importance of the question in the enforcement of the Act, and because of probable conflict with a holding of the Circuit Court of Appeals for the Sixth Circuit." Nowhere in the course of the opinion is there any rejection, specific or by patent implication, of the findings of the latter court as set forth in *General Tobacco & Grocery Company* v. *Fleming,* 126 F (2d) 596. The finding in the Endicott Johnson case relates strictly to the procedure under the Walsh-Healy Public Contracts Act, which differs specifically from the Fair Labor Standards Act of 1938.

The trend and tendency of the present day is to enlarge the functions of administrative bodies in order to to carry out the purposes of social legislation. Com-

mendable as this is, the functions of the Courts remain, and those functions are not merely to act as an adjunct of administrative bodies, but rather in such instances as have been categorically indicated by Congress to implement the operation of such bodies. Desirable as the contribution of experts to government is, there is no indication that Congress has as yet determined to substitute a government of mere expert opinion for a government of law.

The constitutional objections raised by Respondent include one which is based on the First Amendment, relative to abridgment of the freedom of the Press. No attempt to accomplish so reprehensible a purpose appears in this Act. Regulation of conditions under which a newspaper may be published, of itself, does not limit the freedom of the Press as envisaged in that salutary Amendment. The provisions of this Act relating to hours and wages of employees are not restrictions which might fairly be construed as violations of the newspapers' right to function as a medium for impartial distribution of the news. There is no reason why provisions of law aiming at sensible amelioration of conditions of employment should be barred of extension to the field of newspaper publication on the specious pretext of violating the Freedom of the Press. A newspaper is a business in addition to being a medium for dissemination of news and opinion, and as such is subject to the provisions of general laws of government. *Associated Press* v. *Labor Board,* 301 U. S. 103; *Near* v. *Minnesota,* 283 U. S. 697; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Fleming* v. *Lowell Sun Co.,* 36 F. Supp. 320 (reversed on other grounds, 120 F. 2d 213; affirmed 315 U. S. 784).

As for Respondent's contention that the provisions of the Fifth Amendment have been violated by the implications of the Act, there does not seem to the Court

to be merit therein. The Supreme Court has repeatedly asserted that there is no requirement of uniformity in connection with the Commerce power, *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *Florida Fruit and Produce* v. *U. S.*, 117 F. 2d, 506. The Fifth Amendment has no equal protective clause. *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1; *Steward Machine Co.* v. *Davis*, 301 U. S. 548 at p. 584.

As to the insistment by the Respondent that the Act violates the Fourth Amendment to the Constitution, that situation is dependent on the determination hereinbefore made which obviates necessity for discussion.

In view of the foregoing, the order to show cause why an order directing Respondent to appear before the Administrator's agent to produce evidence as set forth in the subpoena, is dismissed.

Since the Administrator has not had opportunity sufficiently to argue the question of coverage, that matter is left to such further proceedings as may be appropriate in the premises.

Let an order be entered in accordance herewith.

[Copy]

ORDER

This matter being opened to the Court by David L. Cole, Esq., of counsel for News Printing Company, Respondent herein; and the Court having heretofore, on April 3, 1943, filed its opinion, and good and sufficient reason appearing for the making of this order; it is on this 14th day of July 1943,

ORDERED

1. That the order issued herein on August 3, 1942, that Respondent, News Printing Company, show cause why an order should not be made directing it to ap-

pear and produce books, documents, and records, be, and it hereby is, vacated;

2. That the petition of the Administrator of the Wage and Hour Division, United States Department of Labor, be, and it hereby is, dismissed; and

3. That the motion of the Administrator of the Wage and Hour Division, United States Department of Labor, dated May 17, 1943, for rehearing, be and it hereby is denied.

THOMAS F. MEANEY,
Judge.

VERA ALEXANDER,
Deputy.

NOTICE OF APPEAL

Filed August 2, 1943

Notice is hereby given this 31st day of July, 1943, that the petitioner, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit, from the judgment of said court entered on the 14th day of July, 1943, in favor of the respondent and against said petitioner.

DOUGLAS B. MAGGS,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

JOHN K. CARROLL,
Regional Attorney,
Attorneys for Petitioner,
United States Department of Labor.

Post Office Address: United States Department of Labor, 14th and Constitution Avenue, NW., Washington 25, D. C.; or 165 West 46th Street, New York 19, New York.

DESIGNATION OF RECORD

TO THE CLERK OF SAID COURT:

In accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, you are hereby requested to make a transcript of the record in this proceeding, to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to the notice of appeal filed in the above-entitled cause, in accordance with the following, which includes the entire record:

1. The application filed by the Petitioner to compel Respondent to attend, testify, and produce documentary evidence, including Exhibits A and B filed therewith.
2. The order to show cause entered August 3, 1942.
3. The return to the order to show cause.
4. The following exhibits filed with the return to the order to show cause:
   - Exhibit A, affidavit of Kenneth E. Olsen
   - Exhibit B, affidavit of Carl W. Ackerman
   - Exhibit C, affidavit of Elisha Hanson
   - Exhibit D, affidavit of Harry B. Haines
   - Exhibit E, affidavit of Thomas Dunkley
5. Opinion of the court filed April 3, 1943.
6. Notice of motion for rehearing.
7. Reply to motion to rehear.
8. The final judgment entered July 14, 1943.
9. The notice of appeal, with date of filing.
10. This designation.

Since the entire record has been designated as the record on appeal, under Rule 75(b) of the Federal

Rules of Civil Procedure, it is unnecessary for the Petitioner-Appellant to serve with this designation a statement of the points on which he intends to rely on the appeal.

Said transcript is to be prepared in accordance with Rule 75 of the Federal Rules of Civil Procedure, and is to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, in 40 days from the date hereof, or within such extension of time as may be granted by the Judge of said Court, not exceeding in the aggregate 90 days from the date hereof.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
JOHN K. CARROLL,
Regional Attorney,
Attorneys for Petitioner,
United States Department of Labor.

Post Office Address: Department of Labor, 14th and Constitution Avenue, NW., Washington 25, D. C.; or 165 West 46th Street, New York 19, New York.

I hereby certify that a copy of the above designation was on the 26th day of July, 1943, mailed to Elisha Hanson, attorney for the Respondent, addressed to him in a Government franked envelope at 729 Fifteenth Street, NW., Washington, D. C.

BESSIE MARGOLIN,
Attorney for Petitioner.

I hereby certify that a copy of the above designation was on the 28th day of July, 1943, mailed to Cole & Morrill, Esqs., attorneys for Respondent, addressed

to them in a Government franked envelope at 45 Church Street, Paterson, N. J.

JOHN K. CARROLL,
Attorney for Petitioner.

ASSIGNMENT OF ERRORS

The plaintiff, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, now shows that the District Court of the United States for the District of New Jersey, committed error in the following respects, upon which errors he will rely in the prosecution of the appeal in the above-entitled cause, for which petition is herewith made:

1. That the court erred in refusing to summarily enforce the Administrator's subpoena.

2. That the court erred in its ruling that the plaintiff was not entitled to enforcement of his subpoena until it was shown that the respondent was within the coverage of the Fair Labor Standards Acts of 1938.

3. That the court erred in its ruling that the respondent's return to the Order to Show Cause raised a factual issue to be disposed of before ordering enforcement of the plaintiff's subpoena.

4. That the court erred in dismissing the plaintiff's petition.

To all of these rulings the plaintiff, by counsel, duly objected and excepted, and the Court furthermore allowed a general exception to all rulings adverse to the plaintiff.

WHEREFORE, plaintiff prays that the said final Order and Judgment may be reversed and for such

other and further relief which to the court may seem just and proper.

Dated August 18, 1943.

DOUGLAS B. MAGGS,
Solicitor,

BESSIE MARGOLIN,
Assistant Solictor,

JOHN K. CARROLL,
Regional Attorney,
United States Department of Labor,
Attorneys for L. Metcalfe Walling,
Administrator,
Wage and Hour Division.

Post Office Address: U. S. Department of Labor, 14th and Constitution Avenue NW., Washington 25, D. C.; or 165 West 46th Street, New York 19, New York.

PETITION FOR APPEAL

To the Honorable THOMAS F. MEANEY, *Judge of the District Court of the United States for the District of New Jersey*:

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, who is the plaintiff in the above-entitled cause, prays that he may be permitted to take an appeal from the final order and judgment entered in the above cause on the 14th day of July 1943, to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignment of errors which is filed herewith, that a citation be issued as provided by law, and that a transcript of the record, proceedings, and paper in the above-entitled cause, duly au-

thenticated, be transmitted to the United States Circuit Court of Appeals for the Third Circuit, within the time, and in the manner provided by law.

Dated August 18, 1943.

DOUGLAS B. MAGGS,
Solictor,

BESSIE MARGOLIN,
Assistant Solictor,

JOHN K. CARROLL,
Regional Attorney,

United States Department of Labor,
Attorneys for L. Metcalfe Walling,
Administrator,
Wage and Hour Division.

ORDER ALLOWING APPEAL

The petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above-entitled cause, for an appeal from the final Judgment and Order entered in this cause, is hereby granted, and the appeal is allowed.

It is further ordered that a certified transcript of the record and proceedings in this cause be transmitted to the United States Circuit Court of Appeals for the Third Circuit, within the time, and in the manner provided by law.

Dated August 18, 1943.

THOMAS F. MEANEY,
District Judge.

CITATION

To NEWS PRINTING COMPANY, *a Corporation, Greeting:*

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for

the Third Circuit, in the city of Philadelphia, Pennsylvania, 30 days from the date hereof, pursuant to an order allowing an appeal from a judgment or order of the District Court of the United States for the District of New Jersey, entered July 14, 1943, in a proceeding wherein L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, is appellant and News Printing Company, a corporation, is appellee, to show cause, if any there be, why the final judgment and order rendered against the said L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas F. Meaney, Judge of the District Court of the United States for the District of New Jersey this 18th day of August 1943.

THOMAS F. MEANEY,
Judge of the United States District Court
For the District of New Jersey.

Served the within Citation on The News Printing Company, a Corporation, by delivering to and leaving with Harry Haines, President, of said Corporation, a copy thereof, at Paterson in the district of New Jersey, on the 19th day of August 1943 and at the same time showing said person this original and informing him of its contents.

HUBERT J. HARRINGTON,
United States Marshal.
by LEO A. MAULT, *Deputy.*

PRAECIPE

To NEWS PRINTING COMPANY, *a Corporation; and the Clerk of said Court:*

Please take notice L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, who had filed a petition for, and obtained the allowance of, an appeal from the judgment or order of the District Court of the United States for the District of New Jersey, entered on the 14th day of July 1943 in the above style proceeding, to the United States Circuit Court of Appeals for the Third Circuit, hereby designates the following as the portions of the record in this cause to be incorporated into transcript of record on his appeal:

1. The petition of L. Metcalfe Walling, Administrator as aforesaid, praying for the enforcement of his administrative subpoena, together with exhibits A and B filed therewith.

2. The order to show cause entered August 3, 1942.

3. The return to the order to show cause.

4. The following exhibits filed with the return to show cause:

Exhibit A. Affidavit of Kenneth E. Olsen
Exhibit B. Affidavit of Carl W. Akerman
Exhibit C. Affidavit of Elisha Hanson
Exhibit D. Affidavit of Harry B. Haines
Exhibit E. Affidavit of Thomas Dunkley

5. The opinion of the Court filed April 3, 1943.

6. Notice of motion for rehearing.

7. Reply to motion to rehear.

8. The final judgment entered July 14, 1943.

9. The notice of appeal filed August 2, 1943, the record to show the date of such filing.

10. The designation filed August 2, 1943.
11. The petition for appeal with date of filing.
12. Assignment of errors with date of filing.
13. The order allowing appeal showing the date of entry.
14. The original citation together with the Marshal's return thereon.
15. This praecipe with proof of service.

The Clerk is requested to prepare the record in accordance with the praecipe and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, at Philadelphia, Pennsylvania, within 30 days from the date of the citation, or within such extension of time as may, by order, be allowed by the District Judge.

Dated August 18, 1943.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
JOHN K. CARROLL,
Regional Attorney,
United States Department of Labor,
Attorneys for L. Metcalfe Walling,
Administrator, Wage and Hour Division.

Post Office Addresses: United States Department of Labor 14th and Constitution Avenue, NW., Washington 25, D. C.; or 165 West 46th Street, New York 19, New York.

AFFIDAVIT OF SERVICE OF COPY OF THE PRAECIPE

DISTRICT OF COLUMBIA, *ss*

Teresa Zaranek, being first duly sworn, deposes and says that she is an employee of the Office of the

Solicitor of the United States Department of Labor at Washington, D. C.; that upon the instruction of Bessie Margolin, Assistant Solicitor, she served a copy of the praecipe for the record in the above-styled proceeding upon Elisha Hanson, 729 Fifteenth Street, NW., Washington, D. C., attorney for the respondent, by depositing the same along with an explanatory letter in the Post Office at Washington, D. C., in a Government franked envelope, addressed as indicated above; that the said copy of the praecipe was personally enclosed by her in the envelope addressed to the said attorney, and sealed by her and deposited in the United States Post Office at Washington, D. C., on the 21st day of August 1943.

TERESA ZARANEK.

Subscribed and sworn to before me this 21st day of August 1943.

[SEAL] ELSIE E. SCHWARZ,
Notary Public.

My commission expires February 29, 1948.

DISTRICT COURT OF THE UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY

I, Benjamin F. Havens, Clerk of the District Court of the United States of America for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original designated record on appeal in the case of In the Matter of the Application of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, for an order Requiring the Production of Documentary Evidence by The News

Printing Company, a corporation, on file and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said district, this 7th day of September, nineteen hundred and forty-three.

[SEAL] BENJAMIN F. HAVENS,
Clerk, District Court, U. S.
By KATHRYN M. FLYNN,
Deputy.

FAIR LABOR STANDARDS ACT

Section 9:

For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

Section 11 (a):

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or

matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

U. S. GOVERNMENT PRINTING OFFICE: 1943

APPENDIX TO BRIEF FOR APPELLEE

1a

APPENDIX.

Exhibit "A".

AFFIDAVIT OF KENNETH E. OLSON.

STATE OF ILLINOIS,
County of Cook, ss:

Kenneth E. Olson, being duly sworn, deposes and says:

I reside at 789 Vernon Avenue, Glencoe, Illinois. I am, and have been since 1937, Dean of the Medill School of Journalism, Northwestern University, Evanston, Illinois. I am a graduate of Northland College, A. B., and of the School of Journalism, University of Wisconsin, A. B. and M. A. in journalism. After my service in France with the American Expeditionary Forces I was a student for some time at the University of Bordeaux.

I have had many years experience in the field of journalism. While attending high school at Prentice, Wisconsin, I worked as a handy man on a weekly newspaper, setting type, operating a linotype machine, and doing some reporting.

Prior to the World War I worked as a reporter and later as City Editor for the Ashland (Wis.) Press and then as a reporter on the Duluth Tribune and the Milwaukee Sentinel. On my return from overseas I joined the staff of the Milwaukee Journal where I was successively copy reader, night editor, telegraph editor, make-up editor, assistant Sunday editor and promotion editor. In 1923 I became managing editor of the Capital Times, Madison, Wisconsin.

From 1924 to 1930, I was engaged in the advertising field first as new business and advertising manager of the Commercial National Bank and Union Trust Company at Madison and later for four years as the head of my own advertising agency, which handled the accounts for some forty banks, trust companies, investment houses and insurance firms.

From 1932 to 1935, I was associated with the Northwest Daily Press Association handling market research and

analyses and national advertising promotion. During this period I was an editorial contributor to the Minneapolis Star.

From 1935 to 1937, I was manager of the New Jersey Press Association. I began part time lecturing at the University of Wisconsin, School of Journalism, while in Madison and was an Assistant Professor there from 1926 to 1930.

I was a Professor of Journalism at the University of Minnesota From 1930 to 1935.

As manager of the New Jersey Press Association, I was also Director of the Department of Journalism at Rutgers University.

I am familiar with the business of publishing newspapers in the United States, with the interests and problems of newspapers, whether published on a one, two, three, five, six or seven day a week basis. Newspapers are published on all those bases and any newspaper with five or more issues a week is known as a daily newspaper. Daily newspapers in turn are known as either morning or evening newspapers. Some newspapers have both morning and evening issues. A number of newspapers are published on Sunday only. Custom has designated them as Sunday newspapers, whereas newspapers published on one week day only are known as weekly newspapers. Semi-weekly and tri-weekly newspapers are just what their names indicate, i. e., publications issued twice or three times a week as the case may be.

Whatever a newspaper may be, weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of information in the printed form. The information in turn is divided into three classes; news, editorial comment and advertising.

The newspaper publishing business is essentially a local business. More than 90 per cent of the total circulation of all daily newspapers and more than 85 per cent of the total circulation of all Sunday papers is distributed within the state of publication. Weekly, semi-weekly and tri-

weekly newspapers have an even greater proportion of wholly intrastate circulation.

Throughout its entire history the business of the press has been one of service. It serves its readers by bringing to them that information in the form of news that the editor regards as sufficiently important to justify its publication; information in the nature of comment on matters of importance; and information concerning the goods, services or ideas of others who pay for the service of its dissemination in the form of newspaper advertising.

Newspaper advertising falls chiefly into four classes known in the business as local display, general or national display, classified and legal. Classified and legal advertising are almost wholly local in character and local advertising accounts for more than 85 per cent of the total volume of newspaper advertising.

Newspapers have but two sources of revenue from the service they render. One is circulation revenue, derived from the sale of their publication, and the other is advertising revenue, derived from the charge made to advertisers for printing, publishing and disseminating information concerning their business or interests.

For more than 100 years it has been the almost universal custom of daily and Sunday newspapers to sell their publications for less than the cost of publication. They must depend upon revenues from the service they render their advertisers to meet the greater portion of the costs of their news and editorial service to their readers. No newspaper in modern times has continued publication for any appreciable period of time on circulation revenue alone.

This practice of selling newspapers at less than their cost of publication has made possible the distribution of newspapers to all elements of our population. It has made possible an informed electorate which our founding fathers envisioned when they entrusted newspapers with the task of keeping citizens informed of the news of their government. Were subscribers to pay for their newspapers on the basis of cost of publication newspaper subscriptions would be very limited. The quantity and quality of public information would be correspondingly limited.

Newspapers employ staffs of highly skilled professional persons to gather, write and edit their news; to solicit, prepare, and lay out advertising copy; and to comment upon matters of general public importance.

According to the Census of Manufactures for 1937 they had the largest number of high salaried employees and the highest paid wage earners of any group engaged in business or industry in the United States.

Instruction in journalism is offered in 545 four-year colleges and universities. With the addition of junior colleges the number is over 700. There are thirty-three professional schools of journalism, whose prerequisite requirements are comparable to those of law schools and schools of medicine. These schools are recognized throughout the educational and business fields as professional schools.

As of the beginning of this year there were more than 13,000 newspapers published in the United States; of which approximately 1,800 were daily or daily and Sunday newspapers and the remainder weekly, semi-weekly, or tri-weekly newspapers. These newspapers employ thousands of persons in executive, administrative and professional capacities and as outside salesmen.

Daily newspapers vary greatly in circulation, ranging from less than 1,000 copies daily to more than 1,500,000 copies. Of the 2,044 daily newspapers published in the United States as of December 31, 1939, 437 had circulations under 3,000 copies daily; 466 between 3,000 and 5,000 daily; 473 between 5,000 and 10,000 daily; 350 between 10,000 and 25,000 daily; and 156 between 25,000 and 500,000 daily; and 78 between 50,000 and 100,000 daily. Only 84 out of 2,044 daily newspapers had circulations in excess of 100,000 daily, and of these only 19 had circulations in excess of 250,000 daily.

Newspapers are essentially and predominantly local in the nature of their service. With few exceptions, all of them have by far the greatest portion of their total aggregate circulation distributed within the trading area of the villages, towns or cities in which they are published. Very few newspapers have any appreciable amount of circulation beyond 100 miles from the place of publication. Thousands of newspapers circulate in far smaller radii,

except in respect of a few mail subscriptions which go mainly to former residents of the localities in which they are published. More than 90 per cent of the daily newspapers published in the United States distribute in excess of 98 per cent of their circulation entirely within the state of publication.

Daily, weekly, semi-weekly and tri-weekly newspapers are competitive with one another in those areas where any two or more of them are published. They are competitive in every form of their service. Each tries best to serve its readers with news and editorial comment on subjects of interest to them. Each tries best to serve advertisers, not only in the publication of their advertising but in the matter of counselling as to preparation of copy and pictures used therein and in the correlation of merchandising plans with the advertising appeal.

While every newspaper has regular schedules for the publication of each of its various editions, no newspaper, if properly it is to serve its readers, can adhere strictly to these in times of flood, disaster, war, political campaigns or other conditions of great news importance. The people want news when it is news, not at some other time, and if a newspaper is to serve then it must be prepared to meet their demands.

Likewise in the purely intellectual field of gathering, writing and editing the news it is impossible for a newspaper to adhere to rigid time schedules. It cannot, for instance, ask a City Council or a state legislature or Congress to hold a session and dispose of matters to meet its convenience. It can neither schedule committee meetings of such legislative bodies nor regulate the time consumed therein. The breaks of the news are beyond a newspaper's control, yet it must at all times be prepared to meet such breaks. The work of those engaged in gathering, writing or editing news, in soliciting, or preparing copy for advertising cannot be standardized in relation to a given period of time. A reporter may spend several days on a single story or he may do several stories in a single day. A copy reader may spend an hour or more on a single involved story and in the next hour handle a dozen shorter stories. A telegraph editor may spend hours putting together the

dispatches from the war zone, making changes in leads as new news comes in between editions. A reporter assigned to a political cleanup may spend days or weeks gathering his information before he writes a single line. A hurricane strikes New England and the New England newspapers must rush men into the field to gather the news in the wake of its destruction. An airplane is wrecked or a train goes through a bridge or fails to round a curve and the newspapers must get the news and the pictures which are a part of the news for their readers. Over the time of such incidents a newspaper has no control. Its operations must be flexible enough for it to handle them.

Any act which imposes a penalty upon a newspaper in its efforts to serve its readers, such as a rigid requirement as to maximum hour week, in my opinion, would serve seriously to restrict the service of the press in the carrying on of its business of gathering and disseminating information.

The definitions of professional, executive and administrative employees and outside salesmen promulgated by the Administrator, known as Regulations Part 541.—Sections 541.1 to 541.6, if applied to the newspaper publishing business will cause irreparable injury to more than 1,000 daily newspapers in this country.

By reason of the very nature of these definitions executives on hundreds of small newspapers who now solicit and prepare advertising, direct circulation, write editorials and perform other services will either be barred from performing those services or entitled to receive time and one-half overtime in excess of 40 hours in any one week. Nearly all of these small daily newspapers operate on a six day basis in villages, towns and cities where there is a limited supply of journeymen mechanics and limited revenue for newspaper publication. Any increased burden on these newspapers will have to be met either through added revenues or by curtailment of service and, in my opinion, from my knowledge of the field they will have to be met through curtailment of service which curtailment will undoubtedly force many of them to reduce their publishing operations from a six day a week to a five day a week basis and others to suspend publication altogether.

It has been a long established custom on these small news-

papers that the foremen in their mechanical departments work at the same tasks as the journeymen working under their direction as many hours in any one week as a journeyman works at straight time rates and perform their executive duties in addition. Under the new definitions a working foreman is limited to eight hours of work similar to that performed by a journeyman working under his direction. If he exceeds eight hours in any one week then under the terms of the Administrator's order he is no longer an executive and his employer is obligated to pay him overtime.

These regulations also fix a minimum of $200 a month for both administrative and professional employees of newspapers. Failing the establishment of such a minimum all persons employed in a professional capacity whether their salaries be lower or higher than $200 per month must be paid overtime for work in excess of forty hours in any one week. There is no difference in the professional nature of the work performed by an editor, a managing editor, a city editor, a news editor, a sports editor, a society editor, a copy reader, a rewrite man, a reporter, an advertising solicitor, an advertising writer, or an advertising layout man who draws more than $200 per month and that performed by one who draws less than $200 per month.

More than 1,300 daily newspapers in the United States have circulations of less than 10,000 copies per day and more than 400 newspapers have circulations of less than 3,000 copies per day. The requirements in these definitions of persons intended by Congress to be exempt from the minimum wage and maximum hour provisions of the Act place an impossible burden on hundreds of daily newspapers. To meet that burden they will either have to curtail their service to their readers or obtain additional revenues elsewhere, failing which many of them will be forced out of business. In my opinion, hundreds of newspapers will be unable to find additional revenues adequate to meet this increased cost. They will either have to curtail their service or suspend publication altogether.

This affidavit is made for use in the above entitled case.

(Signatures and date omitted.)

Exhibit "B".

AFFIDAVIT OF CARL W. ACKERMAN

STATE OF NEW JERSEY,
County of Hunterdon, ss:

Carl W. Ackerman, being duly sworn, deposes and says:

I live at "Briar Patch", Lambertville, New Jersey, and am, and since July 1, 1931, have been Dean of the School of Journalism, Columbia University, New York City. I am Secretary of the Advisory Board which administrates the Pulitzer Prizes in Journalism and Letters.

My interest in journalism began as a newsboy in Richmond, Indiana. I worked on the Richmond Item, a daily newspaper published in that city, as office boy and reporter while attending Earlham College. I am a graduate of Earlham College, A.B., A.M., and of the School of Journalism, Columbia University with the degree of B. Litt.

From 1913 to 1921 I was actively engaged in newspaper work at home and abroad. For four years I was with the United Press Associations in New York, Albany, Washington, London and Berlin. This was followed by professional service with the New York Tribune, The Saturday Evening Post, and The New York Times, chiefly as foreign correspondent in Mexico, Europe, and Asia. In 1919 I organized, and for two years directed, the foreign service for the Philadelphia Public Ledger with headquarters in London. From 1922 to 1928 I was in Public Relations work with headquarters in New York, under the corporate title of Carl W. Ackerman, Inc. In 1931 I was elected Dean of the School of Journalism of Columbia University, after having served for more than a year as assistant to the President of General Motors Corporation. In 1937 in recognition of my services to the profession of Journalism I was elected a member of the American Society of Newspaper Editors and am honorary professor of journalism at the Argentine School of Journalism.

I am thoroughly familiar with the business of newspaper publication as carried on in the United States, with the interests and problems of newspapers,—weekly, semi-

weekly, tri-weekly, daily and daily and or Sunday. I am also familiar with the nature of their revenues and their expenses, as well as with their operations in all departments.

The business of newspapers is the rendering of an indispensable service to the public through the gathering and dissemination in the printed form of information in the nature of news, editorial comment and advertising. In addition there are comics, cartoons and special features. This business is the same for all newspapers irrespective of the frequency of publication whether weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only and if daily whether published in the morning or in the evening and irrespective of the size of any particular newspaper whether its circulation is less than 3,000 copies as is the case of hundreds of both small dailies and weeklies, or more than 1,500,000 copies as is the case of one daily and more than 3,000,000 copies as is the case of one Sunday newspaper.

The common purpose of all newspapers is community service. Each newspaper is a community enterprise, basically a local institution, dependent upon community cooperation for the predominant volume of news and advertising. By disseminating in those communities the news of the day, the comment of the day, pictures and comics, and information concerning business services and products presented in the form of advertising, these newspapers perform a public service.

There are more than 1,800 daily newspapers published in the United States and nearly 12,000 weekly, semi-weekly and tri-weekly newspapers. Of the daily newspapers, 437 have circulations of less than 3,000 a day. In only one main respect do daily newspapers differ in the matter of service from that rendered by Sunday, weekly, semi-weekly and tri-weekly newspapers and that is in frequency of issue. Each carries news, editorial comment and advertising. In the weekly and semi-weekly fields more than 5,000 newspapers have less than 3,000 circulation.

By far the greater portion of the circulation of practically all newspapers in the United States is distributed within the state of publication. More than 90 per cent of the total

number of daily newspapers published in the United States distribute in excess of 98 per cent of their total daily circulations within the States wherein they are published.

Only where newspapers are published in large metropolitan cities or in cities that are but a stone's throw from another state do they have any appreciable out of state circulation. And not all newspapers published in large cities distribute an appreciable amount of their publications outside of the state of publication. To illustrate: The largest newspaper published in the State of New Jersey is the Newark Evening News published at Newark. According to the Audit Bureau of Circulations, the Newark Evening News in 1939 had a circulation in excess of 191,000 daily of which it distributed 99.39 per cent wholly within the State of New Jersey.

I am using the 1939 figures because I made a particular study of them after they were prepared. Since then newspaper circulation has increased, but except where newspapers have sent copies to residents of their communities who have been called into our military service there has been no appreciable increase in out of state circulation or the percentage of out of state circulation in proportion to the whole. The sending of such newspapers, containing information about affairs in their home communities, to our soldiers, sailors and marines, in my opinion merely emphasizes the essentially local and community character of the newspaper publishing business.

Other examples of large newspapers whose circulations have been similarly audited and which have no appreciable amount of circulation outside of the state of publication are the three newspapers published in Indianapolis,—The News with 156,944 circulation; The Star with 127,028 daily circulation; and The Times with 89,155 circulation. The News distributed 99.56 per cent of its circulation; The Star 99.35 per cent of its circulation; and The Times 99.82 per cent of its 1939 circulation entirely within the State of Indiana.

The Cleveland Press which has the largest circulation of any daily newspaper published in the State of Ohio with a circulation in 1939 of 238,547 daily distributed 99.03 per cent of its circulation entirely within that state. The Cleve-

land Plain Dealer with a daily circulation of 216,503 and a Sunday circulation of 397,655 in 1939 distributed 97.56 per cent of its daily circulation and 97.90 per cent of its Sunday circulation entirely within the State of Ohio.

The Columbus Dispatch with a daily circulation of 169,501 and a Sunday circulation of 138,956 in 1939 distributed 99.23 per cent of its daily circulation and 99.33 per cent of its Sunday circulation entirely within the State of Ohio.

More than 92 per cent of the aggregate circulation of all daily newspapers published in the United States is distributed within the state of publication. Reports made to the Audit Bureau of Circulations in 1939 by more than 1000 newspapers whose circulations aggregated 31,478,493 copies daily show that 92.96 per cent of this total is distributed within the state of publication. The reporting newspapers include all dailies having a circulation in excess of 25,000 copies daily, of which there are 318 in the United States. They also include the majority of the 250 daily newspapers whose circulation ranges from 10,000 to 25,000 daily.

For the twelve months' period ending September 18, 1939, the Paterson Evening News had a total daily average circulation of 23,549, of which 23,434 copies, or 99.51 per cent, were distributed entirely within the State of New Jersey.

One other daily newspaper is published in Paterson where respondent's paper is published. This newspaper, the Morning Call, distributed 98.97 per cent of its 1939 circulation within the State of New Jersey.

Only four daily newspapers in New Jersey out of a total of 23 daily newspapers reporting to the Audit Bureau of Circulations distribute in excess of two per cent of their total circulations outside of New Jersey. None distributes in excess of six per cent. All of these are adjacent to state lines.

One further illustration as to newspaper circulation. Of 62 daily newspapers in California reporting to the Audit Bureau of Circulations in 1939, 53 distributed more than 99 per cent of their total circulations within that state. Only one of the remaining nine distributed more than 3 per cent of its circulation outside California. It is a Spanish language newspaper, serving the Spanish speaking

residents of the far southwest and 77.58 per cent of its circulation was distributed within the State of California. The range of circulation of these California dailies was from less than 2,000 a day to approximately 250,000 a day. The smallest daily newspaper in the state with a circulation of 1,084 sent 9 copies outside California. The largest newspaper in the state with a circulation of 249,533 distributed 99.65 per cent of its total circulation in California as against 99.17 per cent for the smallest.

A newspaper's primary service is to the community in which it is published. Local news is by far the most important news published in any newspaper. It is the backbone of a newspaper. No newspaper that fails to serve its local community will long survive. It makes no difference if that community is separated by a state line as are Easton, Pennsylvania, and Phillipsburg, New Jersey; Kansas City, Missouri, and Kansas City, Kansas; Texarkana, Arkansas, and Texarkana, Texas; Cincinnati, Ohio, and Covington, Kentucky; and St. Louis, Missouri, and East St. Louis, Illinois.

Every newspaper, whether daily, weekly, semi-weekly or tri-weekly, is in direct competition with every other newspaper in every form of service in any area in which two or more are published. But, by reason of the peculiarly local nature of the service rendered, this competition does not extend beyond the normal range of circulation, which in turn generally and customarily approximates the local trading area.

Newspapers serve these communities not only with local news, but with county, state, national and international news; with comment on local affairs and on county, state, national and international affairs. They serve the businessmen of the community by disseminating informaton in the form of advertising on whatever they may have to sell. Likewise, they bring to their readers similar information concerning products made elsewhere, of every nature and description.

By the very nature of the service they render, newspapers cannot be put into a strait-jacket as to hours of employment. Like a doctor, who keeps regular office hours, day in and day out, newspapers have an established sched-

ule for publication. But just as a doctor cannot tell nature when it shall order the delivery of a new born child, neither can a newspaper order nature to adhere to a fixed time schedule for turning loose its hurricanes and floods. When Army, Navy and air force operations produce fast-moving news events in global warfare, the newspaper press must be prepared not only to inform the reading public of the details of the battles but must also provide a great deal of background material about the remote geographical areas where the action takes place in order to convey to the public the full significance of the events. Obviously a total war of world-wide proportions confronts the newspapers with extraordinary burdens of an unpredictable character over a long period of time.

Nor can a newspaper direct the breaks of news on any subject. When a great tragedy occurs, such as the San Francisco fire, the Ohio flood, the New England hurricane, or the Charleston hurricane, a newspaper and its employees must be on 24 hour service duty. From the service it renders in such situations a newspaper obtains little or no revenue. Rather its expenses go up, while its revenues go down. A distracted public is not a purchasing public.

Newspapers must print news before it becomes common knowledge in a community, otherwise news has no value either to the reader or to the newspaper publisher or to the employees whose livelihood depends upon publication.

Newspaper work is essentially professional and just as the doctor cannot fix exact schedules for the daily events of life and death, or a lawyer schedules for the troubles of his clients, or an engineer schedules for floods or hurricanes, neither can a newspaper fix and adhere to an exact schedule for its service to its readers.

The work of gathering, writing and editing the news, writing editorials or features, drawing cartoons, soliciting, preparing and laying out advertising, is all of it essentially professional in character and is so recognized by our institutions of learning, by various departments of the federal government, and by the newspaper publishing business.

More than 700 schools, colleges and universities now maintain courses in journalism, Departments of Journalism or Schools of Journalism.

The United States Department of Labor, the United States Civil Service Commission, and the Federal Census Bureau have long regarded and classified those engaged in journalism as professional workers.

The professional schools of journalism incorporated in our universities and colleges are recognized by the principal newspaper organizations of the United States through the National Council of Professional Education for Journalism, representing, among others, the American Society of Newspaper Editors, the American Newspaper Publishers Association, The National Editorial Association, The Southern Newspaper Publishers Association, and the Inland Daily Press Association.

By the very nature of the service they render, newspapers must employ many persons on their staffs. Generally speaking a newspaper has two main departments, the editorial department and the business department. The business department in turn has three main sub-departments,—the advertising department, the circulation department and the mechanical department. The mechanical department in turn is divided into craft units, composed chiefly of printers, photo-engravers, stereotypers, and pressmen, who handle the work of producing the newspaper containing the information gathered by the editorial and advertising departments.

In addition to their professional employees, newspapers employ many persons in executive and administrative capacities and as outside salesmen. Practically all circulation work is done outside the office of publication as is the greater part of advertising solicitation.

The 1937 Census of Manufactures discloses that in 9,244 newspaper and periodical publishing establishments, 142,639 salaried employees were paid $273,635,371 in salaries. In addition these establishments employed 135,215 "wage earners", to whom they paid $221,880,716 in wages. Of the 18 fields reported on in that Census of Manufactures, the newspaper and periodical field stood first in the total number of salaried employees both as to number of employees and as to wages paid. It stood 14th out of 18 in the number of wage earners other than salaried em-

ployees employed, and it stood 8th out of 18 in the aggregate of wages other than salaries paid.

As far as revenue is concerned, newspapers are dependent in large measure for the conduct of their business on the revenue they receive from the advertising they publish. For more than two centuries, from the time of their origin, it has been and now is the substantial, with perhaps only one exception, the universal custom of the daily newspapers in the United States to sell their publications to subscribers and readers at far less than the cost of publication with the result that circulation revenue meets only a fraction of the cost which newspapers incur and must incur in order to perform the function of the press in gathering and disseminating information to the citizens of this country.

In order to sell newspapers in that manner and so as to give the widest dissemination to the information which they offer it is necessary for them to depend on advertising revenue to meet the major cost of publication and distribution. If this revenue is in any way hampered or curtailed or endangered it automatically affects the ability of a newspaper to serve the public.

Just as local news is by far the most essential news published in any newspaper because it is primarily a local enterprise, so is local advertising the most essential to the community and to the publisher in point of view of volume and variety. Advertising falls into four classes—namely, local display advertising; general or, as it is sometimes called, national display advertising; classified advertising and legal advertising, practically all of which originate in the community where a newspaper is published, represent in excess of 85 per cent of the total volume of advertising published in daily newspapers throughout the country.

The application of the mandatory overtime provisions of the Wage and Hour Act to the daily newspaper publishing business in my opinion would seriously impair both the normal and the wartime services of the press.

Both the peace-time prosperity and the wartime morale of a community depend upon thousands of interrelated local, social and economic interests and activities. The

delicate and complex mechanism of community life is wholly dependent upon the accessibility of news and advertising. The United States Government recognizes these facts by maintaining publicity and public relations bureaus in connection with every department and every agency of the Government for the purpose of preparing information for distribution to and publication in daily newspapers. Especially in time of war newspapers are not only an essential but an indispensable link between the government and the people. The United States Government also uses the daily and weekly newspapers directly and indirectly for the publication of advertisements relating to recruiting, to the sale of war bonds, to employment needs of defense industries, etc. In most cases, these advertisements are prepared by government agencies or approved by them, although payment for insertion is borne by industries or by the newspapers themselves as a patriotic service.

In the case of many individual newspapers the application of the mandatory overtime provisions of the Wage and Hour Act would force the elimination of various editions now published—in others it would force a reduction in the frequency of issues; and in still others it would force suspension of publication because of inability to meet the increased financial burden. Therefore, the mandatory application of this Act will result in increasing unemployment and in the shrinkage of newspaper revenue which in turn will result in decreased local business.

This cannot be better illustrated than in a consideration of the application to newspapers of the definitions of executive, administrative and professional employees promulgated by the Administrator on October 12, 1940, and effective on October 24, 1940, known as Part 541,—Sections 541.1 to 541.6.

Under Section 13 (a) (1) of the Act "any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman" as those terms are delimited and defined by the Administrator is exempted from the minimum wage and maximum hour provisions of Sections 6 and 7.

In his definition of an executive the Administrator, inter alia, provides that an executive shall be compensated on

a salary basis at not less than $30 a week exclusive of board, lodging or other facilities and further provides that an executive's "hours of work of the same nature as that performed by nonexempt employees" shall "not exceed 20 per cent of the number of hours worked in the workweek by the nonexempt employees under his direction.

In his definition of an administrative employee the Administrator provides that to be exempt from the overtime provisions of the Act an administrative employee must be compensated at a rate of not less than $200 per month exclusive of board, lodging or other facilities and in his definition of a professional employee he provides that a professional employee shall be compensated on a salary or fee basis at a rate of not less than $200 per month exclusive of board, lodging or other facilities, and that such professional employee's "hours of work of the same nature as that performed by nonexempt employees" shall "not exceed 20 per cent of the hours worked in the workweek by nonexempt employes".

Throughout his entire life deponent has had wide experience in business matters and it has been his observation that administrative employees work under the direction of an executive which fact is recognized by the Administrator in his definition of an administrative employee wherein he states that such an employee "regularly and directly assists an employee employed in a bona-fide executive or administrative capacity".

Furthermore, deponent deposes and says that if the Act be held applicable to the newspaper publishing business the limitation of the hours of work which either an executive or a professional employee may work at tasks similar to those performed by other employees held by the Administrator to be subject to the overtime provisions of the Act will place a further intolerable burden on the business of the press.

On hundreds of small newspapers in the United States the publisher or the general manager may solicit advertising, write copy, write editorials, direct circulation work, keep the books or perform any one or more of numerous tasks performed by his subordinates. Yet under the Administrator's definition if he spends more than eight hours

a week on the type of work performed by his subordinates who are not exempt then his newspaper must pay him overtime for any time he puts in above forty hours a week. Executives of these small newspapers most of which are published on a six day a week basis cannot accomplish their work within forty hours.

For many years it has been the custom of newspapers to employ working foremen in their various mechanical departments. These foremen alone have the power to hire and fire and assign to work. They have sole power to promote or demote. They have the sole power to direct any employee in their departments as to how work should be done, material be handled, machinery be cared for and so forth. It has also been a long established custom that these foremen shall be paid on a weekly basis and where union contracts prevail that they may perform the same amount of work for their employers as journeymen working under their direction perform at straight time rates either in any one day or in any one week. Only very large newspapers employ non-working foremen. Where union contracts are in effect working foremen are members of the union concerned and recognized both by the union and the publisher as executives in charge of their respective departments.

These union contracts almost universally exempt such working foremen from the maximum daily and weekly hour provisions thereof providing the foremen do not perform more work in any one week than journeymen working under them perform at straight time rates. The effect of this regulation if applied to the newspaper publishing business, in my opinion, will compel at least 1,000 newspapers in the United States, if not more, either to pay overtime to foremen in charge of their mechanical departments or reduce their publishing operations from a 6 day to a 5 day base. In hundreds of cases this additional cost, in my opinion, cannot be met by publishers without a curtailment of service and in many cases it cannot be met at all.

The effect of the two provisions in the definition of an employee employed in a bona fide professional capacity requiring a minimum payment of $200 per month and prohibiting such an employee from working more than 8 hours

per week at work of the same nature as that performed by non-exempt employees if applied to the daily newspaper publishing field would be disastrous.

There is no difference in the nature of the work performed by an editor, a managing editor, a city editor, a copy reader, a rewrite man, a reporter, a sports editor, a feature writer, a cartoonist, an advertising writer, an advertising solicitor, or an advertising layout man drawing more than $200 a month in salary and the work performed by any one of these persons drawing less than $200 per month in salary. The nature of the work performed is esentially professional whatever the salary may be.

As hereinbefore pointed out courses in journalism are offered in more than 700 schools, colleges and universities. This development during the past forty years has been due to an expanding public interest in the printed word, in the form of community and group newspapers and periodicals. Our educational institutions have sought to prepare young men and women for the opportunities created by this public interest.

The ambition of every journalism student is to be employed on a commercial publication, that is, on a newspaper or periodical which is operated by selling advertising to pay the major cost of publication, because on these publications there are maintained the highest professional and technical standards and the employee has a status in the community as a professional worker.

Therefore the placing of graudates in the field of journalism by these schools, colleges and universities has been an educational service to the communities, to the newspapers and to the individual citizens themselves.

If this law be held to apply it will seriously curtail the educational services of these institutions, first because time and one-half for overtime is a cost load which many community newspapers cannot sustain, and at the same time, maintain their professional and technical standards; secondly, because a minimum of $200 per month for professional workers is placing the profession of journalism on a financial basis so far above the attainment of thousands of individuals as to be illusory. It is tantamount to saying

that unless a doctor earns $200 a month he is not a professional man. Therefore if this law be held to apply it will force educational institutions now teaching journalism to lower their standards in order that students may be trained for jobs rather than careers.

More than 1300 daily newspapers published in this country have circulations less than 10,000 per day. Of these 466 have circulations between 3,000 and 5,000 per day and 437 have circulations under 3,000 per day. No one of these newspapers can afford to establish a $200 a month minimum for its professional employees. No one of these newspapers can abandon the custom of employing working foremen without irreparable financial injury involving a curtailment of its community service. No one of these newspapers can limit its executives as to the amount of work that they shall do in the solicitation of advertising, writing of editorials, directing circulation efforts and so on, without adding operating costs which the communities they serve cannot absorb.

In substance, a law which in application will adversely affect educational institutions teaching journalism; which will limit employment opportunities in journalism; which will attempt to establish an economic basis for the profession of journalism; which will limit an essential community public service by limiting newspaper services, will adversely affect the community welfare and development of Paterson and therefore not serve either the public interest or the social objective contemplated.

This affidavit is made for use in the above entitled case.

(Signatures and date omitted.)

Exhibit "C".

AFFIDAVIT OF ELISHA HANSON.

CITY OF WASHINGTON,
District of Columbia, ss:

Elisha Hanson, being duly sworn, upon his oath states and deposes that he is an attorney at law with offices at 729 Fifteenth Street, Northwest, Washington, D. C. That he is admitted to practice in the courts of the District of

Columbia, the State of Maryland and before the Supreme Court of the United States. That he is now and for some years past has been general counsel of the American Newspaper Publishers Association which embraces within its membership the publishers of more than 425 daily and/or Sunday newspapers. That, as a part of his duties as general counsel for said Association, he has had to advise members of said Association as to their rights, obligations and duties under various statutes enacted by the Congress of the United States as well as by state legislatures as those statutes affect or interfere with or restrict the business of the press; that in the light of said duties affiant, since the date of the enactment of the Fair Labor Standards Act, has attempted in every proper manner to inform himself as to the policies of administration of that Act insofar as such policies may affect publishers of daily and/or Sunday newspapers in the United States.

Affiant further deposes and says upon information and belief that there has been no formal determination by any of the persons who have served as Administrators of the Wage and Hour Division since the enactment of the Act as to the applicability of the provision of Section 11 (a) of said Act to the daily newspaper publishing business as an "industry subject to this Act". And, upon information and belief, that instead of making such a formal determination prior to conducting investigations into various businesses and industries in the United States, the present Administrator of the Act is engaged upon an investigation of all forms of business and industry in the United States in an effort to determine whether the hours worked by their employees exceed the hours designated in Section 7 of the Act, whether the wages paid to their employees exceed the minimum wages designated in Section 6 of the Act and whether said businesses and industries are paying overtime to their employees or have paid overtime to their employees in accordance with the formula laid down in Section 7 of the Act, since the effective date of the Act, and all of this without any prior formal determination as to whether the Act applies to such business or industry or any particular establishment thereof prior to said investigation.

Affiant further deposes and says that Administrators of the Fair Labor Standards Act, in various public statements and official news releases have asserted the power to make nation-wide inspections of all businesses and industries to be followed up by routine inspections of all businesses and industries, in the absence of complaint and without reference to any charge of violation of law and in the absence of any such charge of violation of law.

Affiant further deposes and says upon information and belief that on January 23, 1940, Philip B. Fleming, then Administrator of the Wage and Hour Act, addressed the Southern States Industrial Council at Atlanta, Georgia, and in the course of his address said:

> "We shall not wait until a complaint has been made against a plant before we look into it, but will visit it as a matter of routine at periodic intervals. That will assure employers of general compliance, and eliminate the possibility of competitive inequities that result when a few find it possible to ignore a law with which their business rivals are forced to comply";

that said remarks are contained in a news release issued by the Wage and Hour Division, United States Department of Labor under date of January 23, 1940, identified as R-600.

Affiant further deposes and says upon information and belief that on April 1, 1940, the Wage and Hour Division, United States Department of Labor, issued press release R-700 wherein Philip B. Fleming, then Administrator of the Act, was quoted as saying:

> "We have inspected an establishment only on a complaint, as we have many complaints awaiting attention. From now on, we are not going to await complaints in order to protect establishments in compliance; that is, paying no one less than 30 cents an hour and paying at least time and a half the worker's regular rate for overtime.
>
> "All regional directors have been instructed to this effect. This is another step toward routine inspection of all establishments governed by this Act."

Affiant further deposes and says upon information and belief that on or about March 1, 1940, said Philip B. Fleming made another statement of similar import as follows:

> "I believe that the only kind of enforcement which will not result in severe competitive disadvantage to those employers who are complying is regular routine enforcement by regular routine inspection of all the establishments whose employees are determined to be covered.
>
> "Where such enforcement and inspection reveals violations of the Act on the part of employers which are not wilful and malicious, it is my intention to give such employers an opportunity to comply and to make amends to the employees in respect to whose wages and hours the violation was ascertained, etc."

and that said statement was reported in the Wage and Hour Reporter under date of March 11, 1940.

Affiant further deposes and says that in the said Wage and Hour Reporter of June 17, 1940, said Administrator Fleming, in discussing his inspection of lumber mills, stated that the drive was not primarily a punitive campaign but that it was his policy to work an entire industry over to see if there have been any violations of the law in that industry.

Affiant further deposes and says upon information and belief that in certain daily newspapers of May 21, 1940, there appeared quotations from a speech made by the said Administrator, Philip B. Fleming, before the Controllers Institute of America wherein he said:

> "If we have any reason to suspect that one hoop-skirt factory is violating the law, we not only check up on it but we immediately move into every other hoop-skirt factory. By that method we are able to make good our promise to the employer that if he complies his competitors also will be made to comply."

Affiant further deposes and says upon information and belief that on August 24, 1940, the then Administrator, said Philip B. Fleming, ordered a nation-wide drive for compliance with the Wage and Hour Law in five manufacturing

industries—furniture, leather goods and luggage, boots and shoes, hosiery and woolen goods; that information concerning such order was contained in an Associated Press dispatch dated, Washington, August 24. That said Associated Press, inter alia, quoted said Administrator, Philip B. Fleming, as stating that in his opinion a majority of the factories to be inspected "as in most of the other industries of the country" were complying with the law and further that the objective of the drive was to bring the minority "into line".

Affiant further deposes and says upon information and belief that on August 25, 1940, the Nashville Tennessean, a daily and Sunday newspaper published at Nashville, Tennessee, quoted William M. Eaves, Regional Director of the Wage and Hour Division, as announcing a drive to check and enforce compliance with the Wage and Hour Law in five industries in Tennessee and Kentucky to begin on August 26 and that said article in said Nashville Tennessean further credited said Regional Director with stating that inspectors making the original drive on these five industries would demand proper record keeping "in order that the way will be paved for quick routine inspections in the future".

Affiant further deposes and says upon information and belief that on September 5, 1940, Frank J. G. Dorsey, Regional Director of the Wage and Hour Administration whose offices are 1216 Widener Building, Philadelphia, Pennsylvania, sent a news release to the daily newspapers published in Easton, Pennsylvania, for use in their editions of September 6, 1940, wherein said Dorsey said:

> "Establishments of five important industries in Easton, Northampton County, and in nearby parts of the state will be inspected at once for compliance with the Federal Wage-Hour Law, Regional Director Frank J. G. Dorsey announced at his office in Philadelphia. The inspections are part of a nation-wide drive by which all establishments covered by the law will be inspected, industry by industry.
>
> "A group of eight inspectors arrived here today to take over the work in this district. The industries that will be inspected here as part of concentrated simul-

taneous inspection throughout the country are: Furniture, Leather Goods and Luggage, Boots and Shoes, Hosiery and Woolen Goods.

"This is a step in a drive to obtain compliance with the Fair Labor Standards Act on a national industry-wide basis, Mr. Dorsey stated. It follows a compliance drive in the lumber industry, now approaching a successful conclusion.

"The object of the drive, Mr. Dorsey explained, is to benefit both employers and employees throughout a given industry, by protecting an establishment that is in compliance from the lower-cost competition of one which is not observing the wage and hour requirements, and by gaining for workers the wages and overtime to which they are entitled under the Act. * * *

"A majority of the factories in these and in the other industries in the country are complying with the Fair Labor Standards Act or have shown a willingness to do so as soon as inadvertent violations are pointed out, Mr. Dorsey stated. The drives are not punitive, nor does the inspection of a given industry mean that it is more of a violator than others. The inspectors on this job will emphasize its educational aspects. They will first locate violations and then by explaining to the non-complying employer the requirements and purposes of the Act and its benetfis to both employers and employees, attempt to bring him into voluntary compliance. Legal action will be taken only if necessary."

Affiant further deposes and says that these routine inspections are in violation of law and in defiance of Congressional policy; that Congress has twice expressed emphatic disapproval of the inspection policy of the Wage and Hour Division.

The 77th Congress during its first session reduced the budget of the Wage and Hour Division for the fiscal year 1942 by eliminating an item of $350,000 requested for inspection purposes. In its report to the House, the House Appropriations Committee said:

"As a matter of policy, the committee is unable to find any justification for placing the inspection on a

basis of inspecting each and every plant that might be covered by the act. There are many enforcement statutes of all kinds being administered by various agencies of the Government. If the Government were to adopt a policy of inspecting every unit of production or every individual that might be covered by these acts, the cost would be staggering and all out of proportion to the benefits to be obtained thereby."

The Senate reinstated the item in the bill. The measure then went to conference. The House unanimously instructed its conferees to insist upon the elimination of the item. This they did and the Senate yielded. In asking for instructions, Representative Tarver, Chairman of the House sub-Committee, said:

"We have moved here that the House insist upon its disagreement to the Senate amendments. We repeat the statement which was made in the presentation of the bill originally that if the House feels that this wholesale investigation of the plant of every employer in the United States should be made, then you ought to vote down the motion which is now being offered."

Notwithstanding the express condemnation of his routine investigations by Congress, affiant deposes and says upon information and belief that Administrator Fleming announced that he intended to continue them in an address before the Mississippi State Federation of Labor at Meridian on July 14, 1941.

Affiant further deposes and says that the Wage and Hour Division continued its routine investigations despite the disapproval of Congress, as is demonstrated by the report of the House Appropriations Committee in reducing by the sum of $250,700 the budget of the Wage and Hour Division for the fiscal year 1943. The report condemns the Division for its failure to follow the wishes of the Committee and Congress in the matter of routine inspections.

Nevertheless, the present Administrator, who defended the Division's methods of investigation before the House Appropriations Committee, has not, to affiant's knowledge, adopted any policy of investigation other than that followed

by his predecessors as hereinbefore described, and continues to assert the power to enter and inspect any individual establishment without reference to any charge of violation of law.

Affiant further deposes and says that there are at the moment more than seventy agencies in Washington which in one form or another exert a regulatory control over the daily affairs of life or compete with those engaged in busines; that the demands which the regulatory agencies make upon business are beyond comprehension; that in 1938, for instance, it was estimated that business concerns in this country were called upon to make more than 135,000,000 reports on more than 4,700 report forms; that the burden has since increased many fold; that only a few weeks ago the head of the War Production Board became so concerned over the waste of time in war plants required for the filling out of these forms that he ordered a study to be made to bring about their simplification; that it has been estimated that in the machine tool industry alone more than 25,000 man hours per week are now required to answer the questionnaires of the Government concerning the activities in that industry; that it is estimated that at the present time there are 35 different Government wartime questionnaires sent to this one industry alone; and that 18 different monthly reports are required of it, four quarterly reports, and one annual report and in addition a report must be made out on every order received as well as a report to accompany every purchase order for materials.

Affiant further deposes and says that the Wage and Hour Division sends report forms to employers with the demand that they be filled out, among them Form AD-85 in which employers are asked to inform the Division whether violations of law have occurred and to agree to make restitution to employees under the Division's supervision; in addition, on information and belief, that officials of the Wage and Hour Division visit employees at their homes to gather information on their hours of labor and rates of pay and solicit complaints of violation of law through confidential questionnaires sent to employees, copies of which will not be made available for perusal by employers.

Affiant further deposes and says that numerous newspaper publishers, including respondent in the above entitled case, have consulted him in respect of the legality of the Administrators' demands for inspection of their books, papers, records, etc. as a part of their general campaign of inspection of all businesses and industries in the United States, in the absence of complaint or charge of violation of the law, in an effort to compel universal compliance with the terms of the Fair Labor Standards Act; that affiant has advised said publishers that in his opinion no such Administrator had or has authority, expressed or implied, to carry on a fishing expedition into the books, papers and records of any newspaper publisher in the hope of turning up a violation of this Act or any other law. Said advice was based in part on affiant's belief that an attempt to apply the Fair Labor Standards Act to daily newspaper publishers generally would violate their rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States; that the daily newspaper publishing business is not such a business as can be regulated by Congress; and further that the assertion of the power to make general inquiry into the conduct of said business for the purpose of determining whether or not it is complying with the Fair Labor Standards Act violates the rights of publishers as guaranteed by the Fourth Amendment to the Constitution of the United States; that a similar general inquiry when attempted by another agency of the Federal Government in respect of another type of business met with a proper condemnation by the Supreme Court of the United States in the notable decision of *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298.

Affiant further deposes and says that where complaints are filed with the Administrator, those complained against are kept in ignorance as to the nature of the complaint as well as the identity of the complainant; that based upon this policy of secrecy, the Administrator has issued an invitation to "competitors and public spirited citizens as well as employees" to complain against those engaged in business and industry and has stated in respect of such complaints that "All information including the identity of the com-

plainant will be held confidential", which invitation and which statement can be found at Page 118 of the Wage and Hour Manual, 1941 Edition, published by the Bureau of National Affairs, Inc., Washington, D. C.

This affidavit is made for use in the above entitled case.

(Signatures and date omitted.)

Exhibit "D".

AFFIDAVIT OF HARRY B. HAINES.

STATE OF NEW JERSEY,
County of Passaic, ss:

(The first part of this affidavit which is printed in Petitioner's Appendix 20a-21a is omitted.)

The following is a list of several weekly newspapers published in the immediate distribution area of the Paterson Evening News, which are competitive with the Paterson Evening News, together with, upon information and belief, the circulation of said weekly newspapers which I have been able to ascertain. No circulation figures are published by the said newspapers and I have been able to procure only the circulation of those newspapers opposite whose names the figures appear.

As to those newspapers concerning which I do not have the figures, I know that in several instances the circulations are substantial.

Allendale Argus Glen Rock Record Midland Park Post Ridgewood Herald-News	Combined	Thursdays Sundays	6,700 10,000
Bergen Herald, East Paterson			3,000
Bloomingdale Argus			1,890
Boonton Times			3,200
Boonton Tribune			
Butler Argus			2,875
Clifton Journal			
Clifton Leader			3,000-3,500
Clifton Times			
Fair Lawn Clarion			

Fair Lawn-Radburn News		2,350
Hawthorne News-Record		3,100
Hawthorne Press		3,800
Haledon Record		1,100
Jewish Post, Paterson		
Lincoln Park Herald		
Little Falls Herald		
Midland Park Press		750
North Jersey Times		
Mountain View		
New American, Paterson		
Passaic Citizen		
Passaic Sunday Eagle		4,500
Paterson Sunday Eagle		10,030
Pompton Lakes Bulletin		
Pompton Lakes Ledger		
Prospector, Paterson	Approx.	800
Prospect Park Herald		800
Ramsey Journal		1,800
Totowa Union		1,600
Waldwick Journal		500-600
West Milford Township Argus		1,380
Wyckoff News		1,600
Wanaque Boro News		1,335

This affidavit is made for use in the above entitled case. (Signatures and date omitted.)

Constitutional Provisions Involved.

Article I, Section 8 of the Constitution of the United States provides:

> "The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory Provisions Involved.

A copy of the Fair Labor Standards Act is bound in as a part of this Appendix beginning at page 35a.

Sections 9 and 10 of the Federal Trade Commission Act provide:

"Sec. 9. For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to re-

quire by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evi-

dence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbfore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

"Sec. 10. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect

or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

[PUBLIC—NO. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages tobe paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which, if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.

[fol. 89] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8443

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner-Appellant,

vs.

NEWS PRINTING COMPANY, INC.

And afterwards, to wit, the 22d day of December, 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Herbert F. Goodrich and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 5th day of March, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 90] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner-Appellant,

v.

NEWS PRINTING CO., INC., Respondent-Appellee

Appeal from the District Court of the United States for the District of New Jersey

Before Biggs, Goodrich and McLaughlin, Circuit Judges

Opinion of the Court—Filed March 5, 1945

By BIGGS, Circuit Judge:

The Administrator of the Wage and Hour Division, United States Department of Labor, petitioned the court below to enforce a *subpoena duces tecum* pursuant to the

provisions of Section 9 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Section 209, to compel the respondent, News Printing Company, Inc., to produce the books, records and documents described in the subpoena before the Administrator or his representatives at Newark, New Jersey. The records sought to be examined relate to the wages paid to the respondent's employees, the hours of work, and the sale or transportation of newspapers, [fol. 91] books, periodicals or goods shipped by the respondent in interstate commerce. The respondent would not permit an examination of its records by agents of the Administrator and refused to obey the subpoena. Consequently the Administrator filed a petition to the court below seeking an order directing the respondent to produce the records covered by the subpoena at such time and place as the court should direct. The petition alleged upon information and belief that respondent was engaged in interstate commerce within the meaning of the Act and was violating Sections 6, 7, 11 (c), and 15 (a) (1) (2) (5) of the Act, 29 U. S. C. A. Sections 206, 207, 211 (c), and 215 (a) (1) (2) (5).

A rule to show cause was issued and the respondent filed a return and answer asserting that it was not within the purview of the Act, that to require it to produce the records specified in the subpoena would constitute a violation of the rights guaranteed to it by the First, Fourth and Fifth Amendments to the Constitution of the United States. The respondent's answer asserted also that it was exempted by the provisions of Section 13 (a) (1) because it was engaged "in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman * * *" An affidavit, executed by the president of the respondent, alleged that it was engaged in printing and publishing in Paterson, New Jersey, a daily newspaper called the "Paterson Evening News" with a circulation of more than three thousand copies and that less than 1% of its papers moved in interstate commerce. Other affidavits filed by the respondent, executed by persons who are experts in the newspaper field, state their conclusions as to what will be the effect of the Act on the newspapers of the United States including that of the respondent. They assert that executing the provisions of the Act will destroy the freedom of the press.

The learned District Judge held that the objections to the subpoena based on the Fifth Amendment were without merit. He held also that other objections made by the re-
[fol. 92] spondent based on the Fourth Amendment turned on the question of the coverage of the respondent by the Act. The court thereupon discharged the rule, stating that since the Administrator had not had the opportunity "sufficiently to argue the question of coverage," the matter was left open for further proceedings. See 49 F. Supp. 659, 661.

The Administrator has appealed. The appeal was taken in accordance with the procedure established by the Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, and also in accordance with the former appellate practice. The appellant has stated that it would be helpful if we would designate which manner of taking the appeal was correct. We think that it was the intent of the framers of Rule 81 to provide that the new and improved appellate procedure should apply insofar as appropriate to proceedings such as that *sub judice*. For an analogy based upon the Criminal Appeals Rules see note 2 to the opinion in United States v. White, 322 U. S. 694, 697. Cf. McCrone v. United States, 307 U. S. 61, 65. Cf. also Perkins v. Endicott Johnson Corporation, 128 F. 2d 208, 226, 227. There is no question, however, in the case at bar as to whether the appeal was taken properly.

The Administrator contends that the Act requires the enforcement of the subpoena without a determination by the court that the employer is within the coverage of the Act. The respondent takes the position that in the absence of proof by the Administrator and a determination by the court that the respondent's business is within the purview of the Act, the execution of the subpoena would be unlawful; that the investigation in any event is unlawful because it is in violation of the rights guaranteed to the respondent by the constitutional amendments herein before referred to and also falls outside the power conferred upon Congress by the Commerce Clause. The respondent treats the proposed investigation as if it were an attempt at regulation and presents in respect to the issue of inspection every constitutional objection which it might assert to regulation
[fol. 93] under the Act. But an inspection of the records of a corporation is not regulation of the corporation even if information gathered by means of the investigation be

employed subsequently as a basis for attempted regulation. Many of the arguments addressed to this court by the respondent would be addressed appropriately to the issue of whether the respondent was subject to the regulatory or penalty provisions of the Act. The court below, however, was concerned only with the question of inspection by the Administrator of the books and records specified in the subpoena.[1]

The problem of the execution of a subpoena without proof of coverage by the Act of the corporation on which it is served is not one of original impression except insofar as the question may be affected by the fact that the respondent is engaged in publishing a newspaper. The question has

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[1] Section 11(a) of the Act, 29 U. S. C. A. Section 211 (a), provides in part, "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records * * *, question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." Section 9 provides that for the purpose of any hearing or investigation provided for in the Act the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 16, 1914 as amended 15 U. S. C. A. Sections 49 and 50, are made applicable to the jurisdiction, powers, and duties of the Administrator. Section 9 of the Federal Trade Commission Act provides that the Commission, or its agents, "* * * shall at all reasonable times have access to, for the purpose of examination * * * any documentary evidence of any corporation being investigated or proceeded against * * *" and that the Commission shall have the power to require by subpoena "* * * the production of all such documentary evidence relating to any matter under investigation." A later clause provides that the District Courts of the United States on refusal of the corporation being investigated to obey a subpoena issued by the Commission "may * * * issue an order requiring such corporation * * * to produce documentary evidence if so ordered * * *"

been adjudicated by the Circuit Courts of Appeals for the First, Second, Fifth, Sixth, Seventh, and Eighth Circuits.[2] With the exception of the Circuit Court of Appeals for the [fol. 94] Sixth Circuit and possibly the Circuit Court of Appeals for the Eighth Circuit these tribunals have held that the Administrator might issue a subpoena without proving that the respondent was within the coverage of the Act. In General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596, the Circuit Court of Appeals for the Sixth Circuit passed on the question of the Tobacco Company's coverage by the Act but concluded that it was not engaged in interstate commerce. The court thereupon reversed the order of the District Court executing the subpoena.

An analogous question was before the Supreme Court in Endicott Johnson Corp. v. Perkins, 317 U. S. 501. In the cited case Mr. Justice Jackson stated that *certiorari* was granted "because of probable conflict with a holding of the Circuit Court of Appeals for the Sixth Circuit" in General Tobacco & Grocery Co. v. Fleming. The Supreme Court,

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[2] Martin Typewriter Co. v. Walling, (CCA 1) 135 F. 2d 918; Walling v. Standard Dredging Corp. (CCA 2) 132 F. 2d 322, cert. den. 319 U. S. 761; Walling v. American Rolbal Corp., (CCA 2) 135 F. 2d 1003; Cudahy Packing Co. v. Fleming, (CCA 5) 119 F. 2d 209, rev. on other grounds, 315 U. S. 357; Mississippi Road Supply Co. v. Walling, (CCA 5) 136 F. 2d 391, cert. den., 320 U. S. 752; General Tobacco & Grocery Co. v. Fleming, (CCA 6) 125 F. 2d 596; Fleming v. Montgomery Ward and Co., (CCA 7) 114 F. 2d 384, cert. den. 311 U. S. 690; Cudahy Packing Co. v. Fleming, (CCA 8) 122 F. 2d 1005, reversed on other grounds, *sub nom* Cudahy Packing Co. v. Holland, 315 U. S. 785. Cf. Walling v. Benson, (CCA 8) 137 F. 2d 501, 503-504, cert. den. 320 U. S. 791. In the Cudahy Packing Co. case last cited, the District Court enforced the subpoena without a showing that there were reasonable grounds for believing that the Act was being violated. In Walling v. Benson the court held that the Administrator was "only required to satisfy the court of the existence of reasonable ground for making the investigation, i. e. reasonable ground to believe that the industry is subject to the Act, and not to make proof of the actual coverage under the Act, nor is the employer entitled to a trial and adjudication of the question of coverage on such an application."

therefore, took cognizance of the Fair Labor Standards Act in the Endicott Johnson decision though that Act was not before it. The Act which was before the Supreme Court was the Walsh-Healey Public Contracts Act, 49 Stat. 2036, 41 U. S. C. A. Sections 35-45, and the specific question adjudicated was the right of the Secretary of Labor to issue a subpoena to compel the production of employment records she having reason to believe that the Walsh-Healey Act had been violated by the corporation. The Fair Labor Standards Act is applicable to raise labor standards generally while the Walsh-Healey Act was intended to improve labor standards in plants of corporations contracting with the government. A corporation by making a contract with the United States may voluntarily submit itself to the pro-[fol. 95] visions of the Walsh-Healey Act but this seems immaterial in employing the analogy of the Endicott Johnson decision to the facts of the case at bar. It should be noted especially that the duties of the Secretary of Labor under the Walsh-Healey Act and those of the Administrator of the Fair Labor Standards Act are similarly administrative. In the Endicott Johnson decision the Supreme Court held that the District Court in declining to execute the subpoena had itself decided the question of coverage by the Act, a function which lay primarily within the field of the Secretary of Labor. Mr. Justice Jackson stated, 317 U. S. at p. 509, "Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions." Accordingly, the Supreme Court held that the District Court lacked authority to hear and determine the question of coverage and that it was the court's duty to order the enforcement of the subpoena upon the showing made by the Secretary of Labor. We consider the decision in the cited case as persuasive in determining the issues presented by the case at bar.

In the instant case the showing made by the Administrator is sufficient. Little doubt may be entertained that the respondent's business is within the definition of "Industry" set out in Section 3 (h) of the Act; that its employees, or at least some of them, are employed within the meaning of Section 3 (g). These definitions are very broad. From

the affidavits filed by the respondent it appears that some[3] of the newspapers published by the respondent move in interstate commerce and that the respondent apparently [fol. 96] is not within the purview of any exemptions specified in Section 13. Moreover, the Administrator, as we have pointed out, alleged upon information and belief that the respondent was engaged in interstate commerce within the meaning of the Act and that he had reasonable grounds for believing that the respondent repeatedly had violated the Act. The showing made by the Administrator in the case at bar is sufficient. To require the Administrator to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation. See Martin Typewriter Co. v. Walling, 135 F. 2nd 918, 919. The learned District Judge in the case at bar did not treat the Administrator's application for the execution of the subpoena as a part of a procedure instituted by the officer charged with the administration of the Act. He treated the Administrator's application as if it were a proceeding to impose the strict legal sanctions of Section 16 of the Act upon the respondent. This was erroneous. If the instant proceeding was one to subject the respondent to the penalties imposed by Section 16, proof of coverage would be required.

All of the authorities discussed or cited in this opinion deal with business corporations none of which was engaged in publishing a newspaper. As we have stated the respondent contends that because its principal business is publishing a newspaper the provisions of the First, Fourth and Fifth Amendments, invalidate, insofar as it is concerned, the provisions of Section 11 of the Act, applicable to ordinary business corporations. The substance of the respondent's argument is that such an investigation as that

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[3] In the case at bar it appears that less than 1% of the newspapers published by the respondent move across state lines, but the fact that the amount of the product moving in interstate commerce is small will not of itself defeat the power of Congress under the Commerce Clause. See United States v. Darby, 312 U. S. 100, 123, and Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453.

proposed by the Administrator would violate the guarantee of freedom of the press.

We think it is unnecessary to embark upon an extended discussion of this or similar contentions of the defendant. We are unable to perceive how the production of the records specified in the subpoena would in anywise impede [fol. 97] the respondent in publishing its newspaper or limit it in disseminating news. Requiring the respondent to produce the records under the subpoena will not constitute an unreasonable seizure or deprive the respondent of its property without due process of law. The respondent has made no showing that the production of its records would oppress it in any way. Production of the respondent's employment and shipping records is too far removed from possible infringement of the respondent's constitutional rights to render its objections presently pertinent.

The execution of the subpoena in the case at bar depends upon Section 9 of the Federal Trade Commission Act. See note 1, *supra*. Section 9 states that the district court may require the production of documentary evidence. The execution of a subpoena such as that in the case at bar rests in the legal discretion of the district courts. That discretion must be exercised in favor of the Administrator in the case at bar.

The judgment of the court below is reversed.

McLAUGHLIN, Circuit Judge, dissenting.

I dissent. I think that the Fair Labor Standards Act imposes on the district court, at the very least, the duty of satisfying itself that the Administrator has reasonable ground for believing that petitioner's business is subject to the Act. No such showing was made, or even attempted, in the instant case. The Administrator merely asserted, upon information and belief, that the petitioner is engaged in the business of publishing a newspaper and in connection with such publication is engaged in production of goods for interstate commerce within the meaning of the Act; and further, also upon information and belief, that he had reasonable grounds for believing that petitioner had repeatedly violated the Act. The petitioner in its return and answer specifically denied that the Act is applicable to its business.

[fol. 98] Section Nine of the Federal Trade Commission Act, which is incorporated into the Fair Labor Standards

Act, expressly gives the district court discretion in the issuance of such subpoena as sought. It calls for the exercise of the independent judgment of the district court. It does not contemplate blind approval of unsubstantiated administrative action where jurisdiction is completely denied. There is nothing to be inferred to the contrary from Endicott Johnson Corporation v. Perkins, 317 U. S. 501. With regard to the Walsh-Healey Act there under consideration, the Supreme Court said: "It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." The procedure of the Secretary of Labor in that matter was strictly in accordance with the provisions of the Walsh-Healey Act. Endicott Johnson production was admittedly devoted in part to government contracts and subject to that Act. It is true that originally the Supreme Court had accepted the case partly because of possible conflict with General Tobacco and Grocery Co. v. Fleming, 125 F. 2d 596 (C. C. A. 6) which had held that in a Fair Labor Standards case, coverage must be proved as a prerequisite to enforcement. The opinion, however, was confined solely to interpretation of the Walsh-Healey Act. It is so construed in Walling v. Benson, 137 F. 2d 501 (C. C. A. 8). There, as here, the Administrator had made no showing at all. The entire basis of that decision is that the Administrator must show the equivalent of probable cause in order to have the district court issue such subpoena, with the court holding that the extent of the showing in an individual case "must necessarily and fundamentally be left to the sound discretion and judgment of the district court." The Benson matter was sent back to the district court to permit the Administrator "to amend his application, if he can and wishes to do so, to allege that [fol. 99] he has reasonable ground to believe that appellees' business is subject to the Act, *as a basis for any showing that he is able and may desire to make on the further hearing in the district court.*" (Emphasis supplied.)

The majority opinion concedes that "The execution of a subpoena such as that in the case at bar rests in the legal discretion of the district courts." It then denies such discretion by saying that here it must be exercised in favor of the Administrator, who had made no showing whatsoever

on which to base his allegations of coverage and repeated violations.

I would affirm the judgment of the district court.

A true Copy:

Teste: —— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 100] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1943

No. 8443

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner-Appellant,

vs.

News Printing Company

Present: Biggs, Goodrich and McLaughlin, Circuit Judges

On appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

By the Court, John Biggs, Jr., Circuit Judge.

March 5, 1945.

Endorsements—Order Reversing Judgment Received & Filed March 5, 1945. Wm. P. Rowland, Clerk.

[fol. 101] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original

Appendices to the Briefs of Appellant and Appellee, as constituting the portions of the Record before this Court at argument; and proceedings in this Court, in the case of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellant, vs. News Printing Co., Inc., No. 8443, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 13th day of March in the year of our Lord one thousand nine hundred and forty-five and of the Independence of the United States the one hundred and sixty-ninth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1179 63

NEWS PRINTING CO., INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX

CITATIONS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

NEWS PRINTING CO., INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The News Printing Co. respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a decree of said court entered on March 5, 1945, reversing the order of the District Court of the United States for the District of New Jersey entered July 14, 1943 (R. 28-29).

The opinion of the District Court (R. 22-28) is reported in 49 F. Supp. 659-661. The opinion of the Circuit Court of Appeals is as yet unreported (R. 89-98).

A

Statement of the Matter Involved

Petitioner is engaged in Paterson, New Jersey, in the business of publishing the "Paterson Evening News", a daily newspaper published each weekday evening throughout the year. Less than one per cent of its circulation of more than 27,000 copies daily is distributed outside of the State of New Jersey (R. 20).

On July 10, 1941, one Henry L. Karabel appeared at petitioner's offices, represented himself to be a duly authorized representative of the Administrator of the Wage and Hour Division, and sought to examine petitioner's books, papers and records. Petitioner refused to permit any such search (R. 4-5, 16-17).

On May 20, 1942, one Leo A. Mault appeared at petitioner's offices and handed petitioner's president a duplicate original of a paper purporting to be a subpoena duces tecum signed by the Administrator of the Wage and Hour Division, commanding petitioner to appear before officers of the Wage and Hour Division at Newark, New Jersey, on May 27, 1942, to testify and to produce certain papers (R. 5-6, 8-9, 18). Petitioner refused to comply with the purported subpoena.

Thereupon, the Administrator applied to the District Court for the District of New Jersey for an order of enforcement of the aforesaid subpoena (R. 2-8).

In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena, petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator had jurisdiction over petitioner's affairs; and that the District Court had jurisdiction in the premises (R. 12). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First,

Fourth and Fifth Amendments to the Constitution of the United States (R. 13).

The District Court held that petitioner had properly raised the question of coverage of its business by the Act and that the Administrator was not entitled to enforcement of the subpoena herein unless such coverage was established. The order to show cause was vacated and the petition of the Administrator was dismissed (R. 28-29).

The Administrator appealed to the United States Circuit Court of Appeals for the Third Circuit. Argument on this appeal was heard on December 22, 1943, in Philadelphia, Pennsylvania.

On March 5, 1945, the Third Circuit Court of Appeals, by a divided court, reversed the judgment of the District Court.

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347(a)). The decree of the United States Circuit Court of Appeals to be reviewed was entered on March 5, 1945 (R. 98).

C

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First, Fourth, and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Record, pages 71-72.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722, 15 U. S. C. Sec 41 *et seq.*). These provisions are set forth in the Record pages 72-88.

D

Questions Presented

1. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a subpoena duces tecum, the respondent therein in response to an order to show cause is barred from making the defense that it is not engaged in commerce or in the production of goods for commerce and therefore is not subject to the Act invoked.

2. Whether the Administrator, acting in an executive capacity, in the absence of any complaint or charge of violation of law, has the power in the light of the provisions of the Fourth Amendment to the Constitution of the United States to make general and routine investigations of all private businesses, including petitioner's, by delegating power to a horde of inspectors with instructions to enter all places of business, including petitioner's, there to fish through their books, papers and records for the purpose of determining whether possibly there have been violations of the Fair Labor Standards Act.

3. Whether Congress has the power, in the light of the provisions of the First Amendment to the Constitution of the United States prohibiting the abridgment of the freedom of the press, to regulate the press.

4. If it be held that Congress has the power to regulate the business of the press, then, in view of the provisions of the First and Fifth Amendment to the Constitution of the United States, whether Congress has the power for the purpose of such regulation arbitrarily to classify the press on the basis of volume of circulation, area of distribution and frequency of issue in such a manner as to exempt thousands of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

E

Reasons Relied On for the Allowance of the Writ

1. The holding of the Circuit Court of Appeals in the present case where petitioner has denied that it is subject to the Act that the mere allegations on information and belief of the Administrator that petitioner is subject to the Act constitute a sufficient showing to entitle him to enforcement of the subpoena is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Walling v. Benson, 137 F. 2d 501 (1943), and the Circuit Court of Appeals for the Sixth Circuit in General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596 (1942).

The holding of the Third Circuit Court of Appeals that, in a proceeding to enforce a subpoena in which the respondent therein had raised the question of coverage, the Administrator's allegation on information and belief that respondent is subject to the Act constitute a sufficient showing to justify enforcement is in conflict with decisions of the Eighth Circuit Court of Appeals and the Sixth Circuit Court of Appeals. Much of the conflict among the Circuit Courts of Appeals on the question of whether a subpoena may be enforced without proof of coverage under the Fair Labor Standards Act has resulted from this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943). This Court should resolve the conflict on this question in order to insure a uniform administration of the Act.

2. The Circuit Court of Appeals' order permitting the Administrator, in the absence of complaint, to fish through petitioner's books, papers and records for the purpose of determining whether or not it has violated the Act violates petitioner's rights as guaranteed by the Fourth Amendment and is in conflict with the decision of this Court in Federal Trade Commission v. American Tobacco Co., 264 U. S. 298 (1924).

The record in this case shows that the investigation was begun in the absence of complaint and was nothing more

than a "fishing expedition" which this Court condemned as a violation of the Fourth Amendment in the *American Tobacco Co.* case. This court should review the order permitting such an investigation.

3. The Circuit Court of Appeals failed to pass upon the free press argument as this argument was presented to it by petitioner.

Petitioner contended that the Act could not be applied to its newspaper publishing business because such application would violate its rights as guaranteed by the First Amendment both by restricting circulation and by permitting Congress to regulate the press by classifying it. The failure of the Circuit Court of Appeals to pass upon this argument as thus presented deprived petitioner of its rights as guaranteed by this Amendment. The holding of the Circuit Court on this point should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

NEWS PRINTING CO., INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinions below, the statement of the matter involved, jurisdiction, and the question presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

Point 1. The holding of the Circuit Court of Appeals in the present case where petitioner has denied that it is subject to the Act that the mere allegations on information and

belief of the Administrator that petitioner is subject to the Act constitute a sufficient showing to entitle him to enforcement of a subpoena is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walling* v. *Benson*, 137 F. 2d 501 (1943), and the Circuit Court of Appeals for the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596 (1942). Much of the conflict among the Circuit Courts of Appeals on the question of whether a subpoena may be enforced without proof of coverage under the Fair Labor Standards Act has resulted from this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943). The holding in the present case violates the individual rights of citizens as guaranteed by the Fourth Amendment and subjects them to unauthorized inspections by the Administrator. A final determination of this question is necessary in order to secure a uniform administration of the Act and to preserve the rights guaranteed by the Fourth Amendment.

Point 2. The Circuit Court of Appeals' order permitting the Administrator, in the absence of complaint, to fish through petitioner's books, papers and records for the purpose of determining whether or not it has violated the Act violates petitioner's rights as guaranteed by the Fourth Amendment and is in conflict with the decision of this Court in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298 (1924). The record in this case shows that the present investigation was begun in the absence of complaint and was nothing more than a "fishing expedition" which this Court has held violates the guaranty of the Fourth Amendment.

Point 3. The Circuit Court of Appeals failed to pass upon the free press argument as this argument was presented to it by petitioner. Petitioner has shown that under the decision of this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), this Act cannot be applied to its newspaper pub-

lishing business for it lays a direct burden on the press. Application of this Act to newspapers would violate the First Amendment both by restricting circulation and by permitting Congress to regulate the press by classifying it.

Argument

POINT 1

The holding of the Circuit Court of Appeals in the present case where petitioner has denied that it is subject to the Act that the mere allegations on information and belief of the Administrator that petitioner is subject to the Act constitute a sufficient showing to entitle him to enforcement of a subpoena is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Walling v. Benson, supra, and the Circuit Court of Appeals for the Sixth Circuit in General Tobacco & Grocery Co. v. Fleming, supra.

Section 11(a) of the Act authorizes the Administrator to make investigations "in any industry subject to the Act" and Section 11(c) requires that "every employer subject to any provisions of this Act" shall make and keep certain records. The Administrator, purporting to act under authority conferred by this statute, issued an alleged subpoena duces tecum in an attempt to investigate petitioner's books and records without making any formal determination or showing that petitioner's business is an "industry subject to this Act" or that petitioner is an employer "subject to any provisions of this Act."

Petitioner refused to obey the purported subpoena duces tecum on the ground that since neither it nor its employees were subject to the Act the Administrator was without authority to inspect its books and records. In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs;

and that the court had jurisdiction in the premises (R. 12). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 13).

The District Court held that petitioner had properly raised the issue of coverage. It sustained petitioner's contention that the Administrator was not entitled to enforcement of the subpoena unless such coverage was established on the ground that "if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto * * *." (R. 26.)

The District Court discharged the rule stating that since the Administrator had not had the "opportunity sufficiently to argue the question of coverage" the matter was left open for "such further proceedings as may be appropriate in the premises." (R. 28.)

The Administrator, however, did not take this opportunity to offer proof of coverage but appealed to the Circuit Court of Appeals for the Third Circuit to enforce the subpoena without proof of coverage. The majority of the court sustained the Administrator stating that his allegations on information and belief that petitioner was subject to the Act constituted a sufficient showing to justify enforcement of the subpoena.

In so holding, the Circuit Court sacrificed the individual rights of citizens for administrative expediency. Under this holding, the Administrator and his subordinates will be permitted to search the records of any citizen even though his business is conducted in such a manner as to be clearly free of control by the terms of the Act. No lawful purpose could be served by such an unauthorized search and so citizens should be permitted to raise the question of coverage at the outset of the proceedings. The time to stop the trespasser is at the threshold.

Furthermore, if the Circuit Court is right in holding that the question of coverage can be tried only in a proceeding to enforce the sanctions of Section 16 of the Act, a citizen, harassed by such inspection, would have to violate the law deliberately in order to get the Administrator to bring an action to enjoin the violation and to have the question of coverage determined by the courts. Surely Congress never intended that a citizen would have to violate the law deliberately in order to secure for himself the rights guaranteed by the Federal Constitution.

As Judge McLaughlin pointed out in his dissent, the holding of the majority in this case is in conflict with the decision of the Eighth Circuit Court of Appeals in *Walling* v. *Benson, supra.* Under that decision a court in enforcing a subpoena must satisfy itself that the Administrator has reasonable grounds to believe that the business investigated is subject to the Act. Here the Administrator has refused to make such a showing and has relied on mere assertions on information and belief that petitioner is subject to the Act.

Moreover, this decision is in conflict with the decision of the Sixth Circuit Court of Appeals in *General Tobacco & Grocery Co.* v. *Fleming, supra.* In that case which arose under the same provisions of the Act as the controversy herein, the court held that where the answer of the respondent tenders an issue of fact on the jurisdictional question of interstate commerce the Administrator must show that the respondent is engaged in interstate commerce or in the production of goods for commerce. The court said:

> "* * * It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F. 2d at p. 599.)

It is submitted that the more recent decision of the Sixth Circuit Court of Appeals in *Walling* v. *LaBelle Steamship Co.*, 8 Wage and Hour Reporter 353, in no sense overrules its prior decision in the *General Tobacco Co.* case. In the *LaBelle Steamship Co.* case respondent, admittedly engaged in interstate commerce, resisted an attempted investigation by the Administrator on the ground that its employees were exempt from the Act as seamen. The court, in holding that respondent was not entitled to have the issue of coverage of its individual employees tried in this proceeding, distinguished the case from the *General Tobacco Co.* case in which the employer denied that it was engaged in commerce or in the production of goods for commerce. Cases such as the *General Tobacco Co.* case and the present proceeding in which petitioner denied that it was engaged in commerce or in the production of goods for commerce and that it was subject to the Act are clearly distinguishable from cases in which part of a business is subject to the Act and only certain employees are exempt from its provisions.

Much of the conflict among the Circuit Courts of Appeals on the question of whether a subpoena may be enforced without proof of coverage under the Fair Labor Standards Act has resulted from this Court's decision in *Endicott Johnson Corp.* v. *Perkins, supra.* The First Circuit in *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (1943) and the Second Circuit in *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (1943) have affirmed judgments enforcing subpoenas without proof of coverage on the authority of this case. The Third Circuit in the present case held that the *Endicott Johnson* case was "persuasive" in determining the issues before it. The Eighth Circuit in *Walling* v. *Benson, supra*, held that this Court's opinion in the *Endicott Johnson* case was confined solely to an interpretation of the Walsh-Healey Act. The Tenth Circuit in *Oklahoma*

Press Publishing Co. v. *Walling*, 8 Wage and Hour Reporter 209, held that this case was not "authority for the contention of the Administrator to the effect that the courts are deprived of the power of discretion in the performance of the judicial function committed to them" by the Fair Labor Standards Act and the Sixth Circuit in *Walling* v. *LaBelle Steamship Co.*, *supra*, adopted this interpretation of the Tenth Circuit.

A final determination of this question is necessary in order to secure a uniform administration of the Act and to preserve the rights guaranteed by the Fourth Amendment. This Court should grant certiorari in the present case and resolve the conflict now existing between the Circuit Courts of Appeals on this question.

POINT 2

The Circuit Court of Appeals' order permitting the Administrator, in the absence of complaint, to fish through petitioner's books, papers and records for the purpose of determining whether or not it has violated the Act violates petitioner's rights as guaranteed by the Fourth Amendment and is in conflict with the decision of this Court in Federal Trade Commission v. American Tobacco Co., supra.

The Administrator in this proceeding has asserted the power to make a general fact-finding investigation of the books, papers and records of all businesses and industries in the United States in aid of enforcement of the Act without reference to any probable cause and without a specific charge of violation of law. The power asserted is an executive power by which the Administrator seeks to police the enforcement of the Act herein.

The record shows and the District Court found that in the present case the Administrator began his attempted investigation of petitioner's business "without complaint and simply in quest of information upon which to base proceedings should they be justified * * *." (R. 25.)

In fact, the investigation of petitioner's business was initiated as a part of a program of making routine investigations of all forms of business and industry in the United States, in the absence of complaint or charge of violation of law, for the purpose of turning up violations of the law (R. 63-66).

Congress, in enacting the Fair Labor Standards Act, did not intend to authorize such a program. On the contrary, it has twice expressed emphatic disapproval of the Administrator's policy of making routine investigations. (For a more detailed discussion of Congressional reaction to this policy see the Record, pages 66-67.)

Petitioner has shown under Point 1 that since no lawful purpose could be served by an investigation of its business unless it is covered by the Act, an investigation without a prior determination that it is subject to the Act would violate its rights as guaranteed by the Fourth Amendment. This violation is even more flagrant in the present case where the investigation was begun without complaint and in a quest for information for such an investigation is nothing more than the "fishing expedition" condemned by this Court in *Federal Trade Commission* v. *American Tobacco Co., supra.*

In the *American Tobacco Co.* case, the Chairman of the Federal Trade Commission, purporting to act under authority conferred by Section 9 of the Federal Trade Commission Act—which section Congress has incorporated into the Fair Labor Standards Act and the Administrator has invoked in the present case—asserted a claim of an unlimited right of access to the records and papers of firms engaged in the tobacco business to the same effect as the Administrator is claiming in this case.

The American Tobacco Company refused to recognize the assertion of power by the Federal Trade Commission and

this Court upheld the company. Mr. Justice Holmes, in condemning this type of investigation, said:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * * and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime * * *"
>
> "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." (264 U. S. at pp. 305-306.)

Thus, it is apparent that the order of the Circuit Court permitting the investigation in this case is in conflict with the decision of this Court in the *American Tobacco Co.* case and should be reviewed by this Court.

POINT 3.

The Circuit Court of Appeals failed to pass upon the free press argument as this argument was presented to it by petitioner.

The Circuit Court of Appeals erroneously interpreted petitioner's First Amendment argument when it stated that the substance of this argument was that "such an investigation as that proposed by the Administrator would violate the guarantee of freedom of the press." (R. 95-96.) Actually, petitioner contended, as has been previously shown under Point 1, that no lawful purpose could be served by permitting an inspection of its business by the Administrator if it is not subject to the provisions of the Act. Petitioner further pointed out that it could not be covered by the Act for the application of this Act to the newspaper publishing business would violate its rights as guaranteed by the First Amendment.

This Court has held in *Murdock* v. *Pennsylvania, supra,* that even a general law applying to all persons alike if it

lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment. The Fair Labor Standards Act is such a law for it lays a direct burden on the press. The business of preparing and publishing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation (R. 46-47, 53-54.) If a publisher is limited in his operations by the application of the burdens of the Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict circulation in order to remove themselves from any possible application of the Act. Restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Near* v. *Minnesota*, 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936).

This Act also regulates the press by classifying it. An analysis of Section 13 (a) (8) shows that Congress classified the press for the purposes of regulation provided in the Act on the basis of volume of circulation, frequency of issue and area of distribution. If Congress has the power to classify the press as it has done here, it can exercise that power so as to benefit or burden any particular portion of the press it so desires. The First Amendment prohibits the exercise of this power by Congress.

The failure of the Circuit Court of Appeals to pass upon the First Amendment argument as thus presented to it deprived petitioner of the rights guaranteed it by this Amendment. The holding of the Circuit Court on this point should be reviewed by this Court.

IV

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 63

NEWS PRINTING CO., INC.,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER, NEWS PRINTING CO., INC.

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INDEX

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SUPREME COURT OF THE UNITED STATES

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Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER, NEWS PRINTING CO., INC.

OPINIONS BELOW

The opinion of the District Court (R. 22-28) is reported in 49 F. Supp. 659. The opinion of the Circuit Court of Appeals (R. 89-98) is reported in 148 F. 2d 57.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 5, 1945 (R. 98). Petition for writ of certiorari was filed on April 19, 1945, and was granted on May 21, 1945.

The jurisdiction of this Court is based on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. Sec. 347(a)).

QUESTIONS PRESENTED

1. Whether in a proceeding instituted for the purpose of compelling compliance with the commands of a subpoena duces tecum, the respondent therein in response to an order to show cause is barred from making the defense that it is not engaged in commerce or in the production of goods for commerce and therefore is not subject to the Act invoked.

2. Whether petitioner is engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3. Whether the Administrator, acting in an executive capacity, in the absence of any complaint or charge of violation of law, has the power in the light of the provisions of the Fourth Amendment to the Constitution of the United States to make general and routine investigations of all private businesses, including petitioner's, by delegating power to a horde of inspectors with instructions to enter all places of business, including petitioner's, there to fish through their books, papers and records for the purpose of determining whether possibly there have been violations of the Fair Labor Standards Act.

4. Whether Congress has the power, in the light of the provisions of the First Amendment to the Constitution of the United States prohibiting the abridgment of the freedom of the press, to regulate the press.

5. If it be held that Congress has the power to regulate the business of the press, then, in view of the provisions of the First and Fifth Amendments to the Constitution of the United States, whether Congress has the power for the purpose of such regulation arbitrarily to classify the press on the basis of volume of circulation, area of distribution and frequency of issue in such a manner as to exempt thousands of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First, Fourth and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Record, pages 71-72.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (38 Stat. 722-723, 15 U. S. C. Secs. 49 and 50). These provisions are set forth in the Record, pages 72-88.

STATEMENT

Petitioner is engaged in Paterson, New Jersey, in the business of publishing the "Paterson Evening News", a daily newspaper published each weekday evening throughout the year. Less than one per cent of its circulation of more than 27,000 copies daily is distributed outside of the State of New Jersey (R. 20).

On July 10, 1941, one Henry L. Karabel appeared at petitioner's offices, represented himself to be a duly authorized representative of the Administrator of the Wage and Hour

Division, and sought to examine petitioner's books, papers and records. Petitioner refused to permit any such search (R. 4-5, 16-17).

On May 20, 1942, one Leo A. Mault appeared at petitioner's offices and handed petitioner's president a duplicate original of a paper purporting to be a subpoena duces tecum signed by the Administrator of the Wage and Hour Division, commanding petitioner to appear before officers of the Wage and Hour Division at Newark, New Jersey, on May 27, 1942, to testify and to produce certain papers (R. 5-6, 8-9, 18). Petitioner refused to comply with the purported subpoena.

Thereupon, the Administrator applied to the District Court for the District of New Jersey for an order of enforcement of the aforesaid subpoena (R. 2-8).

In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena, petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator had jurisdiction over petitioner's affairs; and that the District Court had jurisdiction in the premises (R. 12). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 13).

The District Court held that petitioner had properly raised the question of coverage of its business by the Act and that the Administrator was not entitled to enforcement of the subpoena herein unless such coverage was established. The order to show cause was vacated and the petition of the Administrator was dismissed (R. 28-29).

The Administrator appealed to the United States Circuit Court of Appeals for the Third Circuit. Argument

on this appeal was heard on December 22, 1943, in Philadelphia, Pennsylvania.

On March 5, 1945, the Third Circuit Court of Appeals, by a divided court, reversed the judgment of the District Court.

Petitioner then filed a petition for a writ of certiorari with the Court on April 19, 1945 and certiorari was granted on May 21.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, in a proceeding to enforce a subpoena in which the respondent therein had raised the question of coverage, the Administrator's allegation on information and belief that respondent is subject to the Act constitutes a sufficient showing to justify enforcement.

2. In permitting the Administrator to conduct a fishing expedition into petitioner's books, papers and records in violation of petitioner's rights as guaranteed by the Fourth Amendment.

3. In failing to pass upon the free press argument as this argument was presented to it by petitioner.

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

POINT 1. The holding of the Circuit Court in the present case where petitioner has denied that it is subject to the Act that the mere allegations on information and belief of the Administrator that petitioner is subject to the Act constitute a sufficient showing to entitle him to enforcement of a subpoena is in conflict with the decision of the Eighth Circuit Court of Appeals in *Walling* v. *Benson,* 137 F. 2d

501 (1943), and the Sixth Circuit Court of Appeals in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596 (1942). It violates petitioner's rights as guaranteed by the Fourth Amendment and subjects petitioner to unauthorized searches by the Administrator. No lawful purpose can be served by these searches so petitioner should be permitted to bar the trespasser at the threshold. If the Circuit Court is right in holding that the question of coverage can be tried only in a proceeding to enforce the sanctions of Section 16 of the Act, a citizen not subject to the Act may never be able to have the question tried and thus may never be able to free himself from these inspections. It is submitted that in accepting this Court's decision in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943), as "persuasive" authority for its decision in the present case, the Circuit Court failed to recognize the fundamental differences between the Walsh-Healey Act under which that case arose and the Act involved here. It is further submitted that the other cases cited by the Circuit Court for its decision are not applicable to the present case.

POINT 2. The Administrator began his attempted investigation of petitioner's business in the absence of complaint and simply as a part of a program of making routine investigations of all businesses and industries in the United States. Congress, in enacting the Fair Labor Standards Act, did not intend to authorize such a program. On the contrary, it has expressed emphatic disapproval of the Administrator's policy. The investigation attempted here is nothing more than the "fishing expedition" condemned by this Court as a violation of the Fourth Amendment in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298 (1924). We have to go back more than 180 years in our history to find a parallel to this proceeding and we find it in the use of the notorious writs of assistance. The

Fourth Amendment was written to protect citizens from such unlawful searches and it still stands as a bulwark against the invasion of individual rights attempted by the Administrator herein.

POINT 3. The fact that petitioner receives news, feature articles and other materials from out of state does not bring petitioner within the coverage of the Act. The interstate movement of these materials ends when they reach petitioner. They are processed into an entirely new article before they are passed on to petitioner's readers. The business of publishing a local newspaper is a strictly local business and is not within the coverage of the Act. The fact that one per cent of its circulation goes out of state does not bring petitioner within the purview of the Act. This trifling out of state circulation could not possibly have the detrimental economic effect on interstate commerce which this Act was intended to control. Moreover, this out of state circulation falls within the *de minimis* doctrine.

POINT 4. The Circuit Court of Appeals failed to pass upon the free press argument as this argument was presented to it by petitioner. Petitioner has shown that under the decision of this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), this Act cannot be applied to the newspaper publishing business for it lays a direct burden on the business of the press. If a publisher is limited in his operations by the application of the burdens of the Act, he will be unable to serve his readers adequately. Moreover, newspapers which are unable to operate successfully under the Act will be forced to eliminate their out of state subscribers in order to remove themselves from any possible application of the Act. Furthermore, this Act does not treat all newspapers alike but classifies them for the purpose of regulation. This Court has held that classifica-

tion of newspapers for the purpose of regulation violates the First Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936).

POINT 5. Under the terms of the Act, many of petitioner's competitors in the vicinity of Paterson are exempt from the burdens of the Act. All newspapers are engaged in exactly the same business and mere size affords no basis for regulation. The application of the Act to petitioner while its competitors are exempted constitutes an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments and is in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co.*, *supra*.

ARGUMENT

POINT 1

The District Court was correct in holding that petitioner's return and answer tendered issues of jurisdictional fact and law which required it to determine at the outset whether petitioner's business is an industry subject to the Act.

The Administrator claims plenary power to decide for himself at the outset of an attempted investigation whether an employer is within the coverage of the Act.

Section 11(a) of the Act authorizes the Administrator to make investigations "in any industry subject to the Act" and Section 11(c) requires that "every employer subject to any provisions of this Act" shall make and keep certain records. The Administrator, purporting to act under authority conferred by this statute, issued an alleged subpoena duces tecum in an attempt to investigate petitioner's books and records without making any formal determination or showing that petitioner's business is an "industry

subject to this Act" or that petitioner is an employer "subject to any provisions of this Act."

Petitioner refused to obey the purported subpoena duces tecum on the ground that since neither it nor its employes were subject to the Act the Administrator was without authority to inspect its books and records. In its return to the order to show cause and answer to the petition of the Administrator for enforcement of the purported subpoena, petitioner denied essential jurisdictional facts, namely, that the Act is applicable to the business of petitioner; that the Administrator has jurisdiction over petitioner's affairs; and that the court had jurisdiction in the premises (R. 12). Petitioner also asserted as defenses that the attempted application of the Act to its business violated its rights as guaranteed by the First, Fourth and Fifth Amendments to the Constitution of the United States (R. 13).

The District Court held that petitioner had properly raised the issue of coverage. It sustained petitioner's contention that the Administrator was not entitled to enforcement of the subpoena unless such coverage was established on the ground that "if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto * * *." (R. 26.)

The District Court discharged the rule stating that since the Administrator had not had the "opportunity sufficiently to argue the question of coverage" the matter was left open for "such further proceedings as may be appropriate in the premises." (R. 28.)

The Administrator, however, did not take this opportunity to offer proof of coverage but appealed to the Circuit Court of Appeals for the Third Circuit to enforce the subpoena without proof of coverage. The majority of the

court sustained the Administrator stating that his allegations on information and belief that petitioner was subject to the Act constituted a sufficient showing to justify enforcement of the subpoena.

In so holding, the Circuit Court sacrificed the individual rights of citizens for administrative expediency. It has, in effect, denied petitioner its day in court. The proceeding in which petitioner was commanded to appear in the District Court on a certain day and show cause why an order should not be entered requiring it to comply with an alleged subpoena duces tecum served upon it by agents of the Administrator constituted process and gave petitioner its day in court. In order to enjoy the privileges of its day in court petitioner had the right to present its defenses. To hold, as did the Circuit Court, that petitioner had no such right is to give it its day in court in form but to deprive it in substance. The order directing petitioner to appear in court and show cause why the order should not be directed against it is meaningless if, as a practical matter, petitioner is not permitted to show cause.

Under the holding of the Circuit Court, the Administrator and his subordinates will be permitted to search the records of any citizen even though his business is conducted in such a manner as to be clearly free of control by the terms of the Act. The Circuit Court justified this holding by stating that "inspection of the records of a corporation is not regulation of the corporation * * *." (R. 91.) Such reasoning is unrealistic and completely disregards the rights secured to all citizens by the Constitution.

Petitioner contends that an investigation is lawful only when it is in aid of a lawful purpose and that the attempted investigation herein is unlawful since it is not in aid of a lawful purpose that is within the power of Congress to confer upon the Administrator. See *Kilbourn* v. *Thomp-*

son, 103 U. S. 168 (1881); *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1 (1936). No lawful purpose could be served by such an unauthorized search and so citizens should be permitted to raise the question of coverage at the outset of the proceeding. The time to stop the trespasser is at the threshold. *Ex parte Young*, 209 U. S. 123 (1908).

Furthermore, if the Circuit Court is right in holding that the question of coverage can be tried only in a proceeding to enforce the sanctions of Section 16 of the Act, a citizen, harassed by inspections, would have to violate the law deliberately and subject himself to the penalties imposed by that section in order to have the question of coverage determined by the courts. Surely Congress never intended that a citizen would have to violate the law deliberately in order to secure for himself the rights guaranteed by the Federal Constitution. A citizen not subject to the Act cannot violate it, yet, under this decision, he would be subject to the whims of the Administrator whenever the latter sought to investigate his records. He could not bar the trespasser at the threshold, as is his right against trespassers, and prohibit the illegal entry.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Eighth Circuit Court of Appeals in *Walling* v. *Benson, supra,* in which that court pointed out that in determining whether it should enforce an investigatory subpoena a court "cannot sacrifice responsibility of action for mere ease in its performance" and must be satisfied that the Administrator has "reasonable ground" for believing that the respondent's business is subject to the Act.

As Judge McLaughlin pointed out in his dissent in this case, "No such showing was made, or even attempted, in the instant case." (R. 96.)

Here the Administrator has refused to make such a showing and has relied on mere assertions on information and belief that petitioner is subject to the Act.

This decision of the Third Circuit Court is also in conflict with the decision of the Sixth Circuit Court in *General Tobacco & Grocery Co.* v. *Fleming, supra.* In that case which arose under the same provisions of the Act as the controversy herein, the court held that where the answer of the respondent tenders an issue of fact on the jurisdictional question of interstate commerce the Administrator must show that the respondent is engaged in interstate commerce or in the production of goods for commerce. It denied the Administrator's claim that he had been accorded visitorial and inquisitorial power over all industry and stated:

> "* * * It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects." (125 F. 2d at p. 599.)

The more recent decision of the Sixth Circuit Court in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (1945), in no sense overrules its prior decision in the *General Tobacco Co.* case. In the *LaBelle Steamship Co.* case respondent, admittedly engaged in interstate commerce, resisted an attempted investigation by the Administrator on the ground that its employees were exempt from the Act as seamen. The court, in holding that respondent was not entitled to have the issue of coverage of its individual employees tried in this proceeding, distinguished the case from the *General Tobacco Co.* case in which the employer denied that it was en-

gaged in commerce or in the production of goods for commerce. Cases such as the *General Tobacco Co.* case and the present proceeding in which petitioner denied that it was engaged in commerce or in the production of goods for commerce and that it was subject to the Act are clearly distinguishable from cases in which part of a business is subject to the Act and only certain employees are exempt from its provisions.

The question whether a subpoena may be enforced without proof of coverage under the Fair Labor Standards Act has never been decided by this Court but much of the conflict among the Circuit Courts of Appeals on this question has resulted from this Court's decision in *Endicott Johnson Corp.* v. *Perkins, supra.* The Third Circuit Court of Appeals, in its opinion in the present case, stated that this Court's decision in the *Endicott Johnson* case was "persuasive" in determining the issues before it. It cited as authority for its holding in the present case two cases—*Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1st, 1943), and *Walling* v. *Standard Dredging Corp.* 132 F. 2d 322 (C. C. A. 2d, 1943)—in which the Circuit Courts in *per curiam* opinions affirmed judgments enforcing subpoenas without proof of coverage on the authority of the *Endicott Johnson* case without any written opinion. It is submitted that in accepting this decision as authority for cases arising under the Fair Labor Standards Act the Circuit Courts failed to recognize the fundamental differences between the Walsh-Healey Act and the Fair Labor Standards Act.

In the Walsh-Healey Act, Congress provided a forum in which a respondent can be heard and authorized the Secretary of Labor to hold hearings and make decisions from which appeals are allowed and methods of appeal provided. The only forum available under the Fair Labor Standards Act is the court.

The other cases cited by the Third Circuit Court as authority for its decision are not applicable to the present case. It should be noted that there is a distinction between cases in which an industry is claimed to be wholly outside the coverage of the Act and cases in which some aspects of an industry are admittedly subject to the Act. Thus, in *Walling* v. *American Rolbal Corp.*, 135 F. 2d 1003 (C. C. A. 2d, 1943), the respondent admitted that it was lawfully required to produce the time cards, payroll records and names and addresses of all the employees in its plant but resisted the production of accounts payable records, including gross sale records. *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7th, 1940), *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. C. A. 8th, 1941), and *Cudahy Packing Co. of Louisiana* v. *Fleming*, 119 F. 2d 209 (C. C. A. 5th, 1941), are distinguishable since in none of those cases did the respondent tender an issue of jurisdiction and the parties were admittedly within the coverage of the Act. In *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5th, 1943), the company permitted inspection of the books and records which showed the nature of its business but refused inspection of its wage and hour records on the ground that its employees were not under the Act. The court, in enforcing the subpoena, stated that it appeared from the preliminary hearing that some of the employees were probably engaged in commerce and that there was some question as to whether the company was exempt as a retail and service establishment.

In this case, the Administrator sought to make a routine inspection in the absence of complaint or charge of violation of law. When afforded an opportunity by the District Court to attempt to make such a showing as would entitle him to inspect under the Act, he refused. Rather, in an effort to obtain judicial sanction for the invasion of the

Fourth Amendment in such a way as to give him authority to snoop through anyone's books, papers and records in the hope of turning something up and in the absence of reasonable cause or any cause whatsoever, he took the steps that have now brought the issue to this Court.

It is respectfully submitted this Court should reverse the Circuit Court and sustain the District Court and so protect petitioner from the unlawful inspection attempted by the Administrator.

POINT 2

The Circuit Court of Appeals' order permitting the Administrator, in the absence of complaint, to fish through petitioner's books, papers and records for the purpose of determining whether or not it has violated the Act violates petitioner's rights as guaranteed by the Fourth Amendment.

The Administrator in this proceeding has asserted the power to make a general fact-finding investigation of the books, papers and records of all businesses and industries in the United States in aid of enforcement of the Act without reference to any probable cause and without a specific charge of violation of law. The power asserted is an executive power by which the Administrator seeks to police the enforcement of the Act herein.

The record shows and the District Court found that in the present case the Administrator began his attempted investigation of petitioner's business "without complaint and simply in quest of information upon which to base proceedings should they be justified * * *." (R. 25.)

In fact, the investigation of petitioner's business was initiated as a part of a program of making routine investigations of all forms of business and industry in the United

States, in the absence of complaint or charge of violation of law, for the purpose of turning up violations (R. 63-66).

Congress, in enacting the Fair Labor Standards Act, did not intend to authorize such a program. On the contrary, it has continuously expressed its emphatic disapproval of this policy.

The 77th Congress reduced the budget of the Wage and Hour Division for the fiscal year 1942 by eliminating an item of $350,000 requested for inspection purposes. In its report to the House, the House Appropriations Committee said:

> "As a matter of policy, the committee is unable to find any justification for placing the inspection on a basis of inspecting each and every plant that might be covered by the act. There are many enforcement statutes of all kinds being administered by various agencies of the Government. If the Government were to adopt a policy of inspecting every unit of production or every individual that might be covered by these acts, the cost would be staggering and all out of proportion to the benefits to be obtained thereby." (See House Report No. 688, 77th Cong., 1st Sess., June 2, 1941, pp. 13-14. See also Cong. Record, Vol. 87, p. 4742, June 2, 1941.)

The Senate reinstated the item in the bill. The measure then went to conference. The House unanimously instructed its conferees to insist upon the elimination of the item. This they did and the Senate yielded. In asking for instructions, Representative Tarver, Chairman of the House Sub-Committee, said:

> "We have moved here that the House insist upon its disagreement to the Senate amendments. We repeat the statement which was made in the presentation of the bill originally that if the House feels that this wholesale investigation of the plant of every employer in the United States should be made, then you ought to

vote down the motion which is now being offered." (See Cong. Record, Vol. 87, p. 5799, June 28, 1941; *Ibid.*, pp. 5799-5802 for further discussion and action by the House; *Ibid.*, p. 5820, June 30, 1941, for Senate approval of House action.)

Notwithstanding the express condemnation of his routine investigations, the Administrator announced he intended to continue them. (See speech of Philip B. Fleming, Administrator Wage and Hour Division, U. S. Department of Labor, before Mississippi State Federation of Labor, Meridian, Miss., July 15, 1941. See 4 Wage and Hour Reporter 393-394.)

The announced intention of the Administrator to continue his policy of routine inspection was carried out and was again condemned by Congress.

Reporting on the Department of Labor Appropriation bill for 1943, the House Appropriations Committee again reduced the amount available to the Wage and Hour Division for inspection purposes, this time by the sum of $250,700. After referring to its expression of policy stated in the report of the previous year, the Committee condemned the failure of the Administrator to adopt its recommendations and commented:

> "The Congress cannot pursue these matters into the administrative branch of the Government and enforce its own directions, and must of necessity rely upon the officials of the various departments to carry out faithfully the policies established and the directives given to them by the Congress, but adequate methods for securing compliance are available to the Congress if administrative officers do not heed congressional intent as expressed in reports and debates." (House Report No. 2200, 77th Cong., 2d Sess., June 3, 1942, p. 8.)

The bill as enacted reduced the appropriations bill for that fiscal year as recommended by the Committee.

Congress has continued to express its disapproval of the Administrator's policy of making routine inspections by limiting the funds available for such purposes. Although the Administrator recently warned the House Appropriations Committee that the Wage Hour Division had been forced to cut down its inspections and could not adequately enforce the Act under its reduced budget, the Committee, in reporting out the Labor-Federal Security Appropriations bill for 1946, recommended a further cut in the Wage Hour Division's appropriation. It recommended only $3,804,670 which was $707,330 less than the amount voted the Division for 1945 and $10,530 less than the amount recommended in the Budget estimate. Both the House and the Senate agreed to this reduction in the appropriation for the Division.

Petitioner has shown under Point 1 that since no lawful purpose could be served by an investigation of its business unless it is covered by the Act, an investigation without a prior determination that it is subject to the Act would violate its rights as guaranteed by the Fourth Amendment. This violation is even more flagrant in the present case where the investigation was begun without complaint and solely in a quest for information. Such an investigation is nothing more than the "fishing expedition" condemned by this Court in *Federal Trade Commission* v. *American Tobacco Co., supra.*

The origin of the *American Tobacco Co.* case is especially significant for the reason that the Federal Trade Commission had asserted the same power of general inspection in the absence of complaint or charge of violation of law as the Administrator now asserts in respect of business and industry generally in the United States. It is also noteworthy, in the light of the history of the administration of the Federal Trade Commission Act, that Congress ap-

plied the procedural provisions of that law to the enforcement of the Fair Labor Standards Act.

Reference to the Federal Trade Commission Act shows that the Commission is empowered to gather and compile information concerning and to investigate from time to time the organization, business conduct, practices and management of any corporation engaged in commerce and its relation to other corporations and to individuals, associations and partnerships. In 1921, the Commission asserted a claim of an unlimited right of access to the records and papers of firms engaged in the tobacco business to the same effect as the Administrator is claiming in this case.

The Chairman of the Commission on October 26, 1921, in a letter to counsel for the American Tobacco Company which appears in the record of *Federal Trade Commission* v. *American Tobacco Co., supra,* at pages 16-18, said in respect of Section 9 of the Federal Trade Commission Act:

> "The Commission understands this paragraph to mean that the Commission has an unlimited right of access to the books and records of a corporation under investigation or being proceeded against, at all reasonable hours and to make copies therefrom. It also has the power to require the attendance of witnesses and the production of documentary evidence by subpoena. But the exercise of the right of access, examination, and copying is not dependent upon the prior issue of subpoena."

The Chairman of the Commission further pointed out in his letter that the Commission was proceeding with its examination under the power referred to which it alleged was conferred upon it by Section 9 of the Act—which section is the section which the Administrator has invoked in this pending case.

He further informed counsel for the Tobacco Company that the Commission found no "*limitations in the statutory*

statement of the powers conferred upon the commission, or the duties devolving upon it thereunder." (Emphasis supplied.)

The American Tobacco Company refused to recognize the assertion of power by the Federal Trade Commission and this Court upheld the company. The condemnation uttered by Mr. Justice Holmes of the power which the Federal Trade Commission attempted to assert in 1921 is just as applicable to the power which the Administrator is now attempting to assert under the same section of the same statute.

While the *American Tobacco Company* case was on its way to this Court, the Federal Trade Commission demanded that the Baltimore Grain Company submit its books to inspection by the designated representatives of the Commission. The company refused; whereupon a writ of mandamus was sought to compel compliance with the Commission's demand.

The District Court refused the writ and its action was affirmed by this Court upon the authority of the *American Tobacco Co.* case. *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886 (District Court, D. Maryland, November 20, 1922), affirmed in 267 U. S. 586 (1925).

As Mr. Justice Holmes said in the *American Tobacco Co.* case:

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * * and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. * * *
>
> "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." (264 U. S. at pp. 305-306.)

It is thus apparent from the record before this Court that what the Administrator is trying to do is the very thing which was condemned by this Court in the *American Tobacco* case.

The Administrator here seeks to make investigations outside the scope of the statute and to ferret out possible violations of the law.

We have to go back more than 180 years in our history to find a parallel to a proceeding such as this, and when we locate it we find it in the use of the notorious writs of assistance which were issued by the Royal Court for the enforcement of the revenue laws.

In 1662, during the reign of Charles II, an act was passed to regulate the publication of books in the hope of stamping out utterances of a disloyal nature. This act authorized the issuance of general warrants directing the messengers to search in any place where they knew or had reason to suspect that books were being printed to ascertain whether the books were properly licensed and contained lawful matters.

In the same year the same session of Parliament which enacted the licensing act under which general warrants for the hounding of seditious publications were authorized enacted equally drastic measures for the enforcement of the revenue laws. The chief weapon of enforcement was the writ of assistance.

Nearly one hundred years later, the Prime Minister of England invoked the use of these writs of assistance in the Colony of Massachusetts in an effort to quiet the resentment against taxation without representation. A writ of assistance was a blanket permit issuable to any person in the court's discretion authorizing him to search any suspected place for goods on which duties had not been paid.

Violent opposition to the use of writs of assistance arose in Massachusetts in 1761 and in that year occurred the great

argument in what has been known in history ever since as *Paxton's* case, Quincy (Mass.) 51 (1761).

James Otis resigned his position as Advocate General to the Crown rather than defend the use of writs of assistance by the courts of the Crown and appeared in opposition to their use. In the course of his argument he denounced the use of those writs as

> "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book."

He declared that they placed

> "the liberty of every man in the hands of every petty officer."

Otis lost that case because the court held that the use of the writs was essential to the power of the government to enforce the law.

The same argument is made here today that general inspection of the books, papers and documents of every one engaged in business or industry in the United States is necessary to aid the Administrator of the Wage and Hour Division in the enforcement of the Fair Labor Standards Act. The Administrator has placed no limitation as to frequency of inspection upon his inspectors. Rather he has specifically authorized them to inspect at will and repeatedly thereafter.

The opposition kindled by the Massachusetts colonists' resistance to the notorious writs of assistance spread throughout the colonies. In 1773, the committee of 21 chosen to state the grievances of the colonists complained that their homes had been opened to unlimited inspection at the hands of

"wretches whom no prudent man would venture to employ even as menial servants, whenever they are pleased to say they suspect there are in the house wares for which the duties have not been paid."

The Continental Congress, in its Memorial of the Inhabitants of the British Colonies, remonstrated against the practice of unbridled search and seizure. Each of the colonies in turn, after the Declaration of Independence, in setting up its own government inserted clauses in its state constitution or bill of rights declaring these general search warrants unlawful.

Finally, after the war for independence was won and the Constitutional Convention submitted the original Constitution to the people of this country for ratification, there was such an objection to it because of the failure to include a Bill of Rights that the Constitution would not have been ratified had not the framers thereof consented to propose at the first session of Congress to be held after ratification a series of amendments embracing, among other things, prohibitions against the abridgment of freedom of the press and against unlawful searches and seizures.

The language of the Fourth Amendment is almost identical to the language in the Massachusetts Declaration of Rights of 1765, which was written as a result of the controversy over the use of the writs of assistance.

The parallel is deadly and complete. The Administrator is acting in the role of a prosecutor. Through a host of subordinates to whom he purports to delegate power to probe into all of the records of petitioner as part of a general program of inspection of all business, he is reviving the writs of assistance in another guise. The inspectors and investigators of the Administrator are like the prowlers of old who were armed with writs of assistance to ferret out possible violations of law.

Again are heard the same arguments based upon expediency and the need for effective enforcement. These arguments were only too well known to the framers of the Fourth Amendment which was itself an answer to such arguments.

That Amendment still stands in our Constitution. It should be recognized by this Court as a bulwark against the invasion of individual rights attempted by the Administrator herein.

POINT 3

The Administrator could not have proved coverage in the present case because petitioner is not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

The fact that petitioner receives news, feature articles and materials from out of state does not bring petitioner within the coverage of the Act. This Court, in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943), at page 571, stated that "* * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (1943), the Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state.

It is common knowledge that news reports or features obtained from interstate press wire services are not disseminated to readers exactly as they reach the office of a newspaper like petitioner's. All news stories are first read and then selected or discarded. Those that are selected must be edited to suit the needs of the paper. Heads and

subheads are written. The copy then goes to the composing room where it is set in type and placed on a page form. A mat is made of the entire page form, a cylinder is then cast from the mat and the cylinder then goes on the press.

Furthermore, the supplies such as newsprint and ink which petitioner receives from out of state are changed into an entirely new article before they are passed on to petitioner's readers.

Thus, it is clear that there is no actual or practical continuity of materials from outside the state to petitioner's readers. There is a definite "break" or termination of the interstate movement of the materials.

The fact that a newspaper publisher does not merely pass on to his readers the materials which he has received but sells them an entirely new article was recognized by the United States Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (1943) (certiorari denied, January 17, 1944; rehearing denied, May 22, 1944), when it stated:

> "* * * there can be no question but that the interstate movement of materials used in the publication of papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at p. 114.)

The New York Supreme Court, Appellate Division, in its decision in *Mabee* v. *White Plains Publishing Company, Inc.*, 267 App. Div. 284, 45 N. Y. S. 2d 47[9] (1943), which was unanimously affirmed by the Court of Appeals, 293 N. Y. 781

(1944), followed the *Schroepfer* decision and rejected the contention that the receipt of materials from out of state for use in the production of a newspaper brought the newspaper within the coverage of the Act.

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

As the court pointed out in *Mabee* v. *White Plains Publishing Company, Inc., supra*, the business of publishing a local newspaper is a "strictly local as distinguished from a national activity" and is not covered by the Act. The record in this case shows that petitioner's newspaper is essentially a local community enterprise rendering service to the community in the immediate vicinity of its office of publication (R. 43-46, 50-53). Thus, it falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co., supra.* And, as this Court recently pointed out in *10 East 40th Street Building, Inc.* v. *Charles Callus, et al.*, 89 L. ed. 1244 (advance opinions) (1945), courts must be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The fact that only one per cent of its total circulation goes outside of the State of New Jersey does not bring petitioner's business within the purview of the Act.

As this Court has stated, "the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the im-

pairment or destruction of local businesses by competition made effective through interstate commerce." *United States* v. *Darby*, 312 U. S. 100 (1941) at p. 122. On the record herein, it is plain that the trifling out of state circulation which is purely incidental to petitioner's local service could not possibly have a substantial economic effect on interstate commerce. The papers going out of state do not compete with the local newspapers in the communities they enter and could not possibly impair or destruct the business of these local newspapers.

This out of state circulation falls within the *de minimis* doctrine.

This Court in *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the *de minimis* doctrine. Since, as the Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), and *Walling* v. *Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that there are cases arising under the Fair Labor Standards Act in which the courts should apply the doctrine of *de minimis*.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small portion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754 (E. D. Arkansas, August 22, 1941); *Zehring* v. *Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron* v. *Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al.* v. *Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944);

Mabee v. *White Plains Publishing Company, Inc., supra.* The present case falls within this category.

Thus, it is clear that the Administrator could not have proved that petitioner is subject to the Act. The Circuit Court's decision to permit him to inspect petitioner's books and records was without lawful basis and a flagrant violation of petitioner's rights.

Point 4

The application of this Act to petitioner's newspaper publishing business would violate its rights as guaranteed by the First Amendment.

The Circuit Court of Appeals erroneously interpreted petitioner's First Amendment argument when it stated that the substance of this argument was that "such an investigation as that proposed by the Administrator would violate the guarantee of freedom of the press." (R. 95-96.) Actually, petitioner contended, as has been previously shown under Point 1, that no lawful purpose could be served by permitting an inspection of its business by the Administrator if it is not subject to the provisions of the Act. Petitioner further pointed out that it could not be covered by the Act for the application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry was classified in the Act for the purpose of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13(a)(8) all weekly and semi-weekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

A study conducted by the Wage and Hour Division shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000.

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies.

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (Small Daily Newspapers Under Fair Labor Standards Act, Wage and Hour Economics Division, June, 1942).

Analysis of the provisions of Section 13(a)(8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution.

This Court has held, in *Murdock* v. *Pennsylvania, supra,* that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment.

This Act lays a direct burden on the press. The business of preparing and publishing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation (R. 46-47, 53-54). If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict circulation. If it is held that this Act can be applied to petitioner, it will be forced to eliminate its out of state subscribers. This will deprive these persons of a service to which they are entitled under the provisions of the First Amendment which was written not to guarantee a special privilege to persons engaged in a particular type of business but to guarantee to the citizens of this country the right to have information of vital public importance free from government control or restraint. This Court has held that such restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147 (1939); *Near* v. *Minnesota,* 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co., supra.*

This Act regulates the press by classifying it. If Congress has the power to classify the press as it has done here it can exercise that power so as to benefit or burden

any portion of the press it so desires. This is obvious from the very nature of the factors used by Congress for its classification.

The use of one of these factors, the only one used in fact by the State Legislature of Louisiana, was condemned by this Court in *Grosjean* v. *American Press Co., supra.*

The notorious Huey Long legislature when it sought to penalize those newspapers in Louisiana which were opposed to the Long regime enacted a tax law aimed at silencing the anti-Long press. The legislature classified the press of Louisiana on the single basis of volume of circulation, levying the tax on all newspapers with a circulation in excess of 20,000 per week and exempting all newspapers in Louisiana with a circulation of less than 20,000 per week.

In this Act Congress has not only applied volume of circulation as used by the Louisiana legislature as one of its factors for classifying the press but has added two more, namely, frequency of issue and the area in which a newspaper is distributed. The very use of these factors serves to restrict circulation and deprive the people of their rights to information which our forefathers guaranteed them under the First Amendment.

That Amendment prohibits any such exercise of the power here asserted by Congress.

POINT 5

Application of Sections 6 and 7 to petitioner's business would constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution.

As has been pointed out hereinbefore Section 13(a)(8) of the Act classifies the press on the basis of volume of circulation, frequency of issue and area of distribution in such

a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are many weekly newspapers published in the vicinity of Paterson (R. 70-71). The newspaper published by petitioner is engaged in identically the same business as the weekly newspapers with circulations of less than 3,000 with which it competes. Whether a newspaper be weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of three classes of information in the printed form—news, editorial comment and advertising (R. 43, 50). Mere size affords no basis for regulating certain newspapers and exempting all others.

Therefore, it follows that the application of Sections 6 and 7 to petitioner would constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution and is in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co., supra.*

CONCLUSION

It is respectfully submitted that on the record and the authorities cited the Administrator was without authority to inspect petitioner's books and records and the Circuit Court's holding that he may make such an inspection was a flagrant violation of petitioner's rights as guaranteed by the Constitution. This Court should reverse the Circuit

Court and grant such other and further relief as to the Court may seem proper.

Respectfully submitted,

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v.

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OPINIONS BELOW

The opinion of the district court (R. 22–28) is reported in 49 F. Supp. 659. The majority and dissenting opinions in the circuit court of appeals (R. 89–98) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 5, 1945 (R. 98). The petition for a writ of certiorari was filed on April 19,

1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether adjudication of the issue whether petitioner is subject to the Fair Labor Standards Act is a prerequisite to judicial enforcement of a subpoena duces tecum issued by the Administrator of the Wage and Hour Division.

2. Whether enforcement of the subpoena here involved would violate rights guaranteed by the Fourth Amendment to the Constitution.

3. Whether enforcement of the subpoena would violate the freedom of press guaranteed by the First Amendment to the Constitution.

STATUTES INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix to the Administrator's memorandum (filed simultaneously with this memorandum) in *Oklahoma Press Publishing Co.* v. *Walling*, No. 1171, this Term, also pending on petition for writ of certiorari.

STATEMENT

This was a proceeding instituted by the Administrator to enforce a subpoena substantially identical with that involved in *Oklahoma Press*

Publishing Co. v. *Walling*, No. 1171, this Term, pending on petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. In its response to the order to show cause, petitioner denied that it was subject to the Act and that the district court had jurisdiction, but admitted that it daily distributes some of its newspapers outside of the state (R. 11–21).

The district court denied the Administrator's application on the ground that he was not entitled to enforcement of the subpoena without a showing that the employer is subject to the Act (R. 22–28). It held, however, that there was no merit in petitioner's contention that the application of the Act to newspapers constitutes an abridgment of freedom of the press (R. 27).

The circuit court of appeals reversed the denial of the application (R. 89–96). It held that the Administrator's application made a sufficient showing to entitle him to judicial enforcement of the subpoena (R. 94), pointing out that "to require the Administrator to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" (R. 95). The district court, it held, had erroneously treated the Administrator's application as a proceeding to enforce the statutory sanctions for violations rather than as part of an investigatory procedure. With respect to peti-

tioner's constitutional objections, the circuit court of appeals ruled that an order requiring production of the records called for "is too far removed from possible infringement of the [petitioner's] constitutional rights to render its objections presently pertinent" (R. 96).

Judge McLaughlin dissented on the ground that there was not a sufficient showing of "probable cause" or "reasonable ground for believing that petitioner's business is subject to the Act" to warrant judicial enforcement of the subpoena (R. 96–98).

ARGUMENT

The issues raised in this petition are virtually identical with those raised in *Oklahoma Press Publishing Co.* v. *Walling*, No. 1171, this Term, pending on petition for writ of certiorari to the circuit court of appeals for the Tenth Circuit, and the reasons advanced in the Administrator's memorandum in that case for denial of the petition are equally applicable here. The only additional points made by the petition in the instant case are (1) that the decision below conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Walling* v. *Benson*, 137 F. 2d 501, certiorari denied, 320 U. S. 791, and (2) that the enforcement of the subpoena would violate the Fourth Amendment.

1. Petitioner asserts (Pet. 5, 11) a conflict with *Walling* v. *Benson* because of the requirement

therein that in subpoena enforcement proceedings the Administrator show "probable cause" or "reasonable ground to believe that [the] industry is subject to the Act" (137 F. 2d at 505–506). As we point out in our memorandum in the *Oklahoma Press* case (p. 7), while some of the circuit courts of appeals have stated that there should be a showing of "reasonable grounds" for investigation, and others have not required any such showing, the courts are agreed that no trial and determination of coverage is required. Thus, even if the variation in the decisions can be properly characterized as a conflict, there is nevertheless no occasion for review of the decision below, since, on this record, there is clearly a sufficient showing of "probable cause" to meet the standard of the *Benson* decision. As the circuit court of appeals pointed out, it appears from petitioner's own affidavits that petitioner was shipping some of its newspapers in interstate commerce, and that petitioner apparently was not within the purview of any of the exemptions specified (R. 94–95).

2. Petitioner's charge (Pet. 13–14) that the judgment of the court below permits the Administrator to make a "fishing expedition" into its books and papers is unfounded. The subpoena here is similar in form and scope to the subpoenas repeatedly enforced by the courts (see cases cited in our memorandum in the *Oklahoma*

Press case). It is limited to specific books and papers showing the wages and hours of petitioner's employees during a particular period, and those showing the out-of-State distribution of newspapers during the same period. The information contained in these records is clearly relevant to the determination of whether or not violations have occurred, and is "part of a procedure instituted by the officer charged with the administration of the Act" (R. 95). As the court below held, petitioner "has made no showing that the production of its [employment and shipping] records would oppress it in any way" (R. 96). The decision in *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U. S. 298, is plainly inapplicable here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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